

THE COST OF AVOIDANCE: PLURALISM, NEUTRALITY, AND THE FOUNDATIONS OF MODERN LEGAL ETHICS

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ABSTRACT

This Article offers an answer to key questions in modern American legal ethics: when and why did the legal profession stop talking about professional conduct in moral terms? Mining the history of current rules governing lawyer conduct, this Article reveals that while the 1969 Model Code of Professional Responsibility sought to revolutionize legal ethics by creating a professional code that was more transparent, democratized, and less hierarchical than the preceding 1908 Canons of Legal Ethics, that effort also excised a moral understanding of lawyering in order to facilitate a particular understanding of pluralism.

The drafters of the 1969 Model Code faced a difficult task. They recognized women and minorities were entering the legal profession in unprecedented numbers. Aware of impending conflicts within the newly diverse bar and unsure how to resolve them, drafters of the Model Code struck a devil's bargain: in exchange for the peaceable coexistence of heterogeneous parties, the Model Code sought to remove moral disputes from the workplace by embracing neutral partisanship. This Article discusses the consequences of that choice. It argues that in order to permit one form of pluralism (demographic pluralism) the bar adopted a professional conduct system (neutral partisanship) that now impedes the inclusion of full substantive pluralism (including value pluralism).

Neutrality is not neutral. Avoidance has its costs. The Model Code did not actually remove morality from practice: it only prevented new lawyers from having the language and means to challenge and change existing moral norms in the profession. Modern legal ethics' endorsement of neutral partisanship structurally impedes substantive discussions amongst students, lawyers, judges, and academics about proper ends and appropriate means. This Article is a call to reopen discussion as it reveals why the legal profession embraced this particular model of lawyering in the first place and how that purpose has been frustrated over time.

I. INTRODUCTION.....	152
II. THE CANONS OF ETHICS AND THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY.....	156
A. <i>In the Beginning, the ABA Created the Canons</i>	156
B. <i>From Canons to Code: Operationalizing Theory</i>	159
III. CODIFICATION AND STRUCTURE.....	163
A. <i>Rules Adopted; Ethics Orphaned</i>	164
B. <i>Enforceability: The Model Code and Discipline</i>	169
IV. STANDARDIZING THE STANDARD CONCEPTION.....	170
A. <i>Neutral Partisanship: A Primer</i>	171
B. <i>A Modern Moral Justification of Neutral Partisanship</i>	174
C. <i>Neutral Partisanship as a Vehicle for Client Autonomy</i>	177
1. <i>Candor, Loyalty, and Effective Client Service</i>	178
2. <i>Codifying Trust: The Model Code's Bind</i>	179
3. <i>Clients and the Knowledge Deficit</i>	180

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<i>D. Defining Neutrality and the Limits of Self: Diversity and Equality</i>	182
1. <i>No One Is Neutral: An Example</i>	183
2. <i>Racism Without Racists</i>	185
3. <i>The Model Code Decoded: Examples of Non-Neutral "Neutrality"</i>	187
4. <i>Day to Day Practice: Limited Lawyer's Roles, Limited Lawyers and Their Clients</i>	192
5. <i>Discussion, Dissent, and Homogeneity: The Value of Pluralism</i>	193
V. CONCLUSION	195

I. INTRODUCTION

By the 1960s, the American Bar Association (ABA) could not remain impervious to the general social upheaval of the civil rights revolution.¹ The legal profession was in flux² and faced changes in its overall size and composition as a wave of new entrants from formerly excluded groups gained broader access to higher education and political capital.³ Lawyers and legal regulators faced novel and vexing questions: How could the bar devise ethical standards to include these newcomers, appeal to current members, and distance itself from

1. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278-81, 1295 (1986) (dubbing the late 1960s and the early 1970s the "Public Interest Era"). The Civil Rights Act of 1964, the Twenty-Fourth Amendment abolishing poll taxes, the Voting Rights Act, and the Civil Rights Act of 1968 were all newly minted. See U.S. CONST. amend. XXIV, § 1; Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1-2000h-6 (2012); Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-1 (2012); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

2. See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 216 (2002) ("[T]he American legal profession is subject to the wheels of political and social fortune just like many other occupational groups.").

3. See, e.g., RICHARD L. ABEL, AMERICAN LAWYERS 284 (1989) (showing varying estimates of percentage of women law students in 1970, ranging from 2.8% to 5.1%); A.B.A., FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER, 1947-2011, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf (last visited Feb. 12, 2015) (noting that in 1960, women accounted for 3.4% of total J.D. enrollment, and by the late 1970s, that number rose significantly to 30.8%, which marks an 806% increase in the percentage of women enrolled in J.D. programs over a period of less than twenty years); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 13-27 (1992) [hereinafter ABA, LEGAL EDUCATION] (describing a rapid diversification of the bar throughout the 1960s in terms of race and gender); Wolfram, *supra* note 2, at 222 ("Prior to the 1970s, various aspects of the legal profession had seen little change, including (1) the profession's size, (2) its percentages of men (very large) and women (minute) lawyers, (3) its racial composition (predominantly white), (4) the size of law firms, (5) the number of law schools and the size of the law student population, (6) the incomes of lawyers relative to other occupational groups, and (7) the constrained conditions for competition within the legal profession."); see also Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, at A1 (reporting new ABA figures showing 49.4% women among 2000-01 law students, with more women than men applying for 2001-02).

its exclusionary past?⁴ What moral views regarding the role of lawyers and hot-button topics like civil disobedience would female or minority attorneys hold?⁵ And if they did have different views than the existing bar, “*whose* conscience and *whose* ethical standards [we]re to control?”⁶

The 1969 Model Code of Professional Responsibility (Model Code) was the bar’s answer to these questions.⁷ In it, the bar laid out professional principles to govern lawyers in an “urbanized society”⁸ and break with the dated and elitist 1908 Canons of Ethics.⁹ This was no easy task. The mechanics of a new, more inclusive system of professional conduct were not obvious. Faced with moral and demographic pluralism at the bar and unwilling or unable to negotiate it, the drafters of the Model Code struck a devil’s bargain; in exchange for

4. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 485 (2001) (“[T]he ABA until well into the twentieth century functioned mainly as an exclusive social fraternal organization of high-status lawyers rather than as a broadly representative and unofficial regulatory body.”).

5. See *infra* notes 85-91 and accompanying text. Much of the established bar viewed civil disobedience skeptically, while newer entrants may have supported opposition of unjust laws through civil disobedience. In the view of the existing bar, lawyers had no role in fomenting disobedience of established laws, even if these laws were oppressive, for lawyers instead ought to work through established legal channels to effectuate change. See, for example, 111 CONG. REC. 15103 (1965), in which one of the leading legal ethics reformers—in an address originally given to the Tennessee Bar Association on June 17, 1965, introduced into the record by Strom Thurmond—warned of civil disobedience’s ability to “seriously threaten the breakdown of law, order, and morality” and called for “impartial, even-handed, vigorous, swift and certain enforcement of our criminal laws, and the real and substantial punishment thereunder of all conduct that violates those laws.” See also *id.* (arguing that “[n]o ‘end’ . . . however worthy [can ever] justify resort to unlawful means” and that “America needs a genuine revival of respect for law and orderly process . . . a new impatience with those who violate and circumvent the laws, and a determined insistence that laws be enforced” (alterations in original)).

6. John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 260 (1970) (official reporter for the Model Code explaining the reasons that supported the Code’s development).

7. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1259 (1991) (“[R]adical changes occurring in the profession weakened the traditional bar’s conception of itself, which in turn enhanced the bar’s difficulties in dealing with the fact that its norms were becoming public law.”); Wolfram, *supra* note 2, at 210 (“[S]tresses within our society . . . affected American law and the American legal profession. These stresses created a fertile ground for legal change to occur and appear to have combined as its triggering force.”). See generally Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines*, 11 Touro L. REV. 609, 610-11 (1995); Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787 (1998).

8. MODEL CODE OF PROF’L RESPONSIBILITY Preface (1980); see also Edward L. Wright, *Study of the Canons of Professional Ethics*, 11 CATH. LAW 323, 323 (1965) (“[T]he Canons of Professional Ethics of the American Bar Association need revision [because] . . . changing conditions in an urbanized society require new statements of professional responsibility.”).

9. See *infra* notes 23-28.

the peaceable coexistence of heterogeneous parties, they excised discussions of morality from the workplace.

This Article discusses the consequences of that choice. It argues that in order to facilitate one form of pluralism (demographic pluralism) the bar adopted a professional conduct system (neutral partisanship) that now impedes the inclusion of full substantive pluralism (including value pluralism). It did so by creating a set of national disciplinary rules that removed discussions of morality from professional discourse.¹⁰ Those rules incorporated, strengthened, and operationalized previous loose commitments to a client-centric model of lawyering now known as "neutral partisanship."¹¹ Just as colorblindness became the new hegemonic paradigm elsewhere, the legal profession adopted its own sanitized regime for regulating a diverse bar and avoiding conflict through the neutral-partisan model.

However, neutrality is not neutral. Avoidance has its costs. Modern legal ethics' endorsement of neutral partisanship structurally impedes meaningful discussions amongst students, lawyers, judges, and academics about proper ends and appropriate means. The Model Code did not succeed in removing morality from standards of practice; it only prevented new lawyers from developing the language and means to challenge and modify existing moral norms in place. The Model Code set a certain moral vision of legal professionalism: lawyers were not expected to be any more than legal technicians, fulfilling clients' ends. Certain skills were prioritized, others cast aside. A lawyer's moral contemplation, empowerment, or even responsibility was rendered officially optional. As a result, today's legal profes-

10. See, e.g., Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 10 (1970) (chairman of the drafting committee noting that "[t]he division [between issues concerning morals versus issues requiring disciplinary action] is one that has not previously been generally made" in legal ethics and that "[o]ne of the weaknesses of the Canons of Professional Ethics was its failure to speak to the two forces separately"); *Singleton v. Stegall*, 580 So.2d 1242, 1244 n.4 (Miss. 1991) ("Our rules regulating professional conduct have evolved from canons to ethical considerations and now to a code quite like unto a criminal code.").

11. Neutral partisanship is the idea that lawyers are not accountable for the morality of their client's chosen ends (hence neutrality) and yet act as a partisan in favor of their client's interests (by providing representation that argues on their client's behalf). This concept has many attendant names including "amoral lawyering" or "role morality" and "role differentiation," since the role of being a lawyer is viewed as morally distinct from actions taken on from the "role" of being a private citizen. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (using the term amoral lawyering model due to the distance of the lawyer's moral accountability for client outcomes); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1378 (defining role morality as "the idea, much maligned by legal ethicists, that lawyers should receive some degree of immunity from the general requirements of conscience on account of their distinctive social role").

sion suffers from a self-imposed inability to talk about morality or fundamental differences in the workplace.

Equally troubling, this neutral-partisan ideal renders all lawyers interchangeable widgets, as the bulk of what makes lawyers individuals is deemed professionally irrelevant, worthless, and even inappropriate. Neutral partisanship is the dominant moral fiction where all people are expected to behave the same way, and that singular way of acting is deemed “neutral”—although, in reality, it is not.

This Article tells the story of how and why neutral partisanship became the dominant norm for modern lawyering and argues that while such “neutrality” may have at one time served the purpose supporting pluralism at the bar, today it has outlived its utility. Part II begins by laying out how the bar came to pursue demographic pluralism in drafting the Model Code and why the adoption of neutral partisanship became a vital part of that process. Part III discusses how the Model Code set up a system that solidified a commitment to neutral partisanship by divorcing morality from mandatory rules governing professional conduct. Finally, Part IV explains how neutral partisanship actually impedes a full understanding of pluralism which includes value pluralism. It does so by critiquing 1) the argument that neutral partisanship placed the power in the hands of the clients (the people) over “elitist” lawyers and 2) the idea that neutral partisanship itself is (or can be) value neutral.

I conclude that the Model Code has failed to serve the very values that it sought to facilitate: broad conceptions of pluralism.¹² As such, the ongoing disenfranchisement of discussions of morality in modern professional discourse cannot be justified on those terms. However, by recognizing the historically contingent normative commitments embedded in modern legal ethics, the bar and the academy can work towards revitalizing legal ethics so that it becomes a tool for the modern bar, not a hindrance to it.

12. Current norms, rules, and regulations governing lawyers today exist because of the shift in legal ethics from a treatise-style discussion of professionalism to a statute-like structure that polices the conduct of lawyers—a shift that occurred with the advent of the Model Code. See, e.g., *Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1582 (1994) (“Unlike the Canons, the Model Code provided specific and legally binding normative rules, thus ‘legalizing’ substantive professional regulation.”); Hazard, *supra* note 7, at 1251 (“In retrospect, it is clear that the crucial step in the ‘legalization’ process occurred in the change from the 1908 Canons to the 1970 Code, rather than from the Code to the 1983 Rules. It was the Code that first embraced legally binding norms in the form of the Disciplinary Rules . . .”).

II. THE CANONS OF ETHICS AND THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

A. *In the Beginning, the ABA Created the Canons*

In the United States, the history of attempts to formalize legal ethics into a national document is concise.¹³ In part in response to the American Medical Association's adoption of a professional code of ethics, as well as concern over excessive "commercialism" in law practice,¹⁴ the ABA¹⁵ created an advisory ethics committee in 1905.¹⁶ The Committee's work culminated in a draft ethics proposal entitled the "Canons of Professional Ethics" (Canons).¹⁷ George Sharswood's 1854 essay, "An Essay on Professional Ethics," was of particular importance as it was reprinted and circulated to all ABA members with the draft Canons.¹⁸ The ABA membership ultimately adopted these Canons officially in 1908.¹⁹

The Canons were brief, containing only thirty-two guidelines, and were written in broad terms. They read more like a treatise or essay

13. This is not to say, however, that no rules governed lawyer behavior prior to this time. Rather, the common law, in connection with norms of practice and homogeneity in the group of people trained in law, provided guidance on improper conduct.

14. Commercialism was code for opposition to the emergence of working class lawyers who served immigrants, the urban poor, and blue-collar workers. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41-43 (1976).

15. At the turn of the century membership in the ABA was by invitation only and limited to a small but highly influential percentage of the overall lawyer population. See JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 10 (2013).

16. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1, 7-8 (1999) ("[L]aw journals at the turn of the century were replete with articles lamenting growing 'commercialism' in law practice . . .").

17. David R. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in *ETHICS AND THE LEGAL PROFESSION* 29, 37 (Michael Davis & Frederick A. Elliston eds., 1986). The Canons borrowed doctrinally from the ethics rules of Alabama, as well as the works of George Sharswood and David Hoffman upon which the Alabama Code of Ethics was based. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 11 (7th ed. 2000) (discussing how Professor Sharswood's work was influenced by David Hoffman's 1836 publication *Fifty Resolutions in Regard to Professional Development*); Carle, *supra* note 16, at 9 (relaying how the drafters of the Canons consulted Hoffman and Sharswood in addition to existing state codes, particularly that of Alabama); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *ALA. L. REV.* 471, 507 (1998) (discussing the role the Alabama Code served as a model for the original Canons).

18. *Final Report of the Committee on Code of Professional Ethics*, 33 *ANN. REP. A.B.A.* 567, 568 (1908) [hereinafter *Final Report*]; GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 14-15 (4th ed. 2005); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 243 (1992).

19. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 617 (2008).

than a rulebook.²⁰ The Canons' lofty tone was often distinctly moral in nature, concluding that a lawyer finds his "highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and a patriotic citizen," not exclusively in the service of a client.²¹

The level of generality of the Canons' wording did not prevent it from becoming canonical quickly, in the sense of being widely adopted and influential.²² Although the ABA had (and has) no authority over the various state bars, over time the Canons were formally or informally adopted in most states through either direct bar or court action.²³ Over the next sixty years, the ABA added only fifteen provisions to the Canons.²⁴ Thus, the original 1908 Canons remained largely intact and central to governing legal practice in the United States well into the early 1970s.²⁵

Critiques of the Canons were strong and mounting by the 1960s.²⁶ In 1958, the ABA Joint Conference had submitted an ethics report penned in large part by Lon Fuller, a celebrated ethics scholar, flagging the need to revisit the Canons. He noted that "[t]oday the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined."²⁷ For some, concerns focused on the lack of specificity and en-

20. See generally *Final Report*, *supra* note 18, at 575-85.

21. *Id.* at 584.

22. See HENRY S. DRINKER, *LEGAL ETHICS* 23-26 (1953); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1, cmt. b (2000) (noting how states differed in treating the Canons as mandatory rules or nonbinding guidance for proper conduct); Papke, *supra* note 17, at 39 (noting how three-fourths of all states had adopted the Canons by the beginning of World War I).

23. But note, bar adoption is not necessarily coterminous with a consensus of support from practicing lawyers. Some scholars have noted that participation in bar associations is partially the purview of economic privilege, as time spent on bar associations necessarily cuts into time spent on billable or paying matters. See Papke, *supra* note 17, at 36 ("Country lawyers could rise to prominence in the bar associations of rural states, but in general urban lawyers, with the resources and types of practices that could facilitate convention-eering and organized bar work, were the leaders of the bar associations.").

24. Canons 33-45 were adopted at the ABA's annual meeting in 1928. See *Proceedings*, 51 ANN. REP. A.B.A. 29, 130 (1928). Canon 46, regarding advertisement of specialized legal services, was adopted at the ABA's annual meeting in 1933. See *Proceedings*, 56 ANN. REP. A.B.A. 41, 178, 429 (1933). Canon 47, regarding conduct that aids the unauthorized practice of law, was adopted on September 30, 1937. See *Supplemental Report of the Standing Committee on Professional Ethics and Grievances*, 62 ANN. REP. A.B.A. 761, 767 (1937).

25. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS* 11 (9th ed. 2012).

26. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958) (seminal report calling for reform of the Canon-based system).

27. *Id.* at 1159.

forceability in the Canons.²⁸ In keeping with the distributive justice sentiments of the time, others critiqued the profession's failure to serve underrepresented groups of the American population.²⁹ Some highlighted the darker undertones of the Canons' naissance, arguing that it functioned as a gatekeeper to keep ethnic minorities and women from gaining upward mobility as lawyers and serving low income and immigrant communities.³⁰ The Canons were also susceptible to critique as maintaining the landed gentry's exclusivity of the bar.³¹ With general, ambiguous language and limitations on advertising, fees, and client development, the Canons were a natural poster child for the established bar's elitism and distance from less well-connected lawyers and clients.³²

These internal and external concerns finally came to a head in 1964. That year, the ABA president, and future Justice, Lewis F. Powell Jr., convened a "Special Committee on the Evaluation of Ethical Standards" (known as the "Wright Committee") to propose amendments to the existing Canons.³³ Originally, the Wright Committee convened with the purpose of recommending revisions to the

28. See MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980) (listing among the shortcomings to the Canons that "most of the Canons did not lend themselves to practical sanction for violations"); 58 ANN. REP. A.B.A. 94-95 (1935) (arguing that the Canons offer little concrete guidance and suggesting "a Code of Practice which will deal not with general principles but with the specific abuses involved"); John F. Sutton, Jr., *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391, 422-23 (1961) (arguing that the Canons are insufficiently specific to set a reasonable minimum standard); Wright, *supra* note 10, at 4 (quoting a 1958 American Bar Foundation report stating that the Canons do not present "sufficient detail" in dealing with "specific situations encountered in actual practice").

29. See Papke, *supra* note 17, at 38, 41. See generally Wolfram *supra* note 4, at 485 ("[T]he ABA until well into the twentieth century functioned mainly as an exclusive social fraternal organization of high-status lawyers rather than as a broadly representative and unofficial regulatory body.").

30. See, e.g., AUERBACH, *supra* note 14, at 43-130; RICHARD HOFSTADTER, *THE AGE OF REFORM* 157 (1955).

31. See Hazard, *supra* note 7, at 1250 ("The Canons . . . expressed the viewpoint of an economically advantaged social stratum distinguished by its intellectual accomplishment, attachment to the business community, and preoccupation with civic political affairs."); Papke, *supra* note 17, at 38 (discussing disproportionate effects of the Canons, particularly limitations of expertise claims and advertising, on solo practitioners who serviced working class people). See generally Harry Cohen, *Ambivalence Affecting Modern American Law Practice*, 18 ALA. L. REV. 31, 31 (1965) ("Many rules and principles which purport to guide professional conduct today are based on the premise that the American lawyer is in the same economic and professional environment as his predecessors who practiced in the nineteenth century or as barristers in the English system."); Donald T. Weckstein, *A Re-Evaluation of the Canons of Professional Ethics—Evaluated*, 33 TENN. L. REV. 176, 180 (1966).

32. See Carle, *supra* note 16, at 16 (noting that all fourteen final committee members were members of the "social and economic elite of the profession" and were exclusively white, Anglo-Saxon, and Protestant).

33. See GILLERS & SIMON, *supra* note 19, at 617-18; HAZARD ET AL., *supra* note 18, at 14.

existing Canons.³⁴ However, attempts to reword the Canons “became an extended search for the full meaning of professional responsibility in the context of modern day society, a search that culminated in the formulation of the [Model] Code.”³⁵ As such, the Committee began a multi-year journey of deliberations that eventually resulted in the Model Code of Professional Responsibility.

B. From Canons to Code: Operationalizing Theory

Wright Committee members were mindful of the political climate and contemporary changes facing the legal profession.³⁶ As the preface to the Model Code makes explicit, the Model Code was drafted in direct response to contemporary practice.³⁷ It noted that the “changed and changing conditions in our legal system and urbanized society require new statements of professional principles.”³⁸ New demographics of people were joining or about to join the profession in force.³⁹ The “[r]ecruitment into the profession was affected by programs reaching out to racial minorities and women, whose assimilation into law practice became both a norm of public policy and a legal duty.”⁴⁰ The profession was also growing quickly in size, partially in response to the expansion of the administrative state.⁴¹ The Committee was aware of the urgency behind the need to adapt. It emphasized this in the Code:

34. See Wright, *supra* note 10, at 5 (“A completely changed document was not envisioned.”).

35. *Id.* at 6.

36. The chair of the Committee, Edward L. Wright, stated that the Model Code was a “substantial improvement” over the Canons precisely because “it is the result of a thorough review of the functions of lawyers in modern-day society.” *Id.* at 17.

37. MODEL CODE OF PROF'L RESPONSIBILITY Pmb'l. n.5 (1980) (“The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purpose and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being.” (quoting Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A. L. REV. 438, 440 (1965))).

38. *Id.* at Preface.

39. See, e.g., ABA, LEGAL EDUCATION, *supra* note 3 (describing a rapid diversification of the bar throughout the 1960s in terms of race and gender); ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, A.B.A. COMM. ON RACIAL & ETHNIC DIVERSITY IN THE LEGAL PROFESSION (2004). Cf. Beverly Balos, *Confering on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 361 (1994) (noting that the MacCrate report overlooked disabled and homosexual lawyers).

40. Hazard, *supra* note 7, at 1259.

41. See BARBARA A. CURRAN, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8-9 (1995) (noting that because of a steep increase in total numbers of law students, increased percentages of women law students did not displace male students in the total number of law jobs available to them); Hazard, *supra* note 7, at 1259 n.109.

The advances in natural science and technology are so startling and the velocity of change in business and in social life is so great that the law along with the other social sciences, and even human life itself, is in grave danger of being extinguished by new gods of its own invention if it does not awake from its lethargy.⁴²

The extent to which societal shifts were on the minds of the drafters of the Code is evident in the Model Code's multiple references to evaluating lawyer's roles in response to historical context and fluid circumstances.⁴³ The preamble of the Model Code also reminded lawyers that "a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society."⁴⁴ Acknowledging the momentous changes in society, the Code identifies the difficulties this places on the bar itself:

Changing times produce changes in our laws and legal procedures. . . .

We have undergone enormous changes in the last fifty years within the lives of most of the adults living today who may be seeking advice. Most of these changes have been accompanied by changes and developments in the law Every practicing lawyer encounters these problems and is often perplexed with his own inability to keep up, not only with changes in the law, but also with changes in the lives of his clients and their legal problems.⁴⁵

Thus, mindful of the need to transform and the social pressures at play in an "urbanized society,"⁴⁶ the Wright Committee embarked on drafting a Model Code that met these needs, yet was "designed to be acceptable to the profession" as it currently stood.⁴⁷ The Wright Committee itself was hardly an anti-establishment group.⁴⁸ Although the Committee chair, Edward L. Wright, noted that the twelve members of the Committee represented "a broad spectrum of the profes-

42. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 n.1 (1980).

43. See, e.g., *id.* at EC 2-7 ("Changed conditions, however, have seriously restricted the effectiveness of the traditional [attorney] selection process."); *id.* at EC 2-10 ("Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms."); *id.* at EC 8-1 ("Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system.").

44. See *id.* at Pmbl.

45. *Id.* at EC 6-1 n.1 (internal quotations omitted).

46. *Id.* at Preface.

47. Hazard, *supra* note 7, at 1252.

48. See Wright, *supra* note 10, at 2 nn.1-3 (listing Walter P. Armstrong, Jr., John Ritchie, A. James Casner, Sylvester C. Smith, Glenn M. Coulter, John G. Weinmann, E. Smythe Gambrell, Sherman Welpton, Jr., Benton E. Gates, Charles E. Whittaker, William H. Morrison, and Edward L. Wright).

sion,” others might categorize it as a fairly narrow slice of society reflecting the traditional demographics of the profession.⁴⁹ The Committee included the Associate Dean of Harvard Law School,⁵⁰ the Dean of Northwestern Law School,⁵¹ one former Supreme Court Justice,⁵² and nine current practitioners in private practice (including two former ABA presidents).⁵³ Wright himself was a lawyer from private practice in Arkansas where he was a longtime active member of the ABA, a leader of the American College of Trial Attorneys, and a prospective future president of the ABA.⁵⁴ He was known for being “outwardly conventional—indeed formal—in dress, conversation, and deportment.”⁵⁵ The Committee did not include women or members of minority racial or ethnic groups. The Wright Committee’s membership is notable as the process of drafting the rules was private; the Committee deliberated in closed meetings, no interim drafts were published or circulated, and no hearings were held.⁵⁶ During the final years of the process, a young female attorney acted as an assistant reporter to the Committee, but there is no indication that she was consulted for substantive input.⁵⁷

The Wright Committee faced unique challenges. Unlike the drafters of the Canons in 1908 who were drafting rules for a comparatively homogenous membership, the Wright Committee was crafting rules for an increasingly diverse group of lawyers. The drafters likely did not share many personal connections or common experiences with these new entrants.⁵⁸ Recognizing that there would be multiple views of what is moral conduct in the emerging bar, “the issue quickly becomes, *whose* conscience and *whose* ethical standards are to con-

49. *Id.* at 2.

50. *Id.* at 2 n.3.

51. *Id.*

52. *Id.* at 2 n.1.

53. *Id.* at 2 n.4. Notably, Gambrell founded the Legal Aid Society of Atlanta. *Genesee County Bar Program Wins ABA Professionalism Award*, 79 MICH. B.J. 1159, 1180 (2000).

54. See Wright, *supra* note 10, at 2.

55. Hazard, *supra* note 7, at 1252.

56. See *id.* at 1253.

57. John F. Sutton, a University of Texas law professor and former chairman of the Texas State Ethics Committee, acted as the official reporter. For the last two years of the process, Sutton was assisted by a recent University of Texas School of Law graduate, a young woman who came to take a very active role in the civil right struggle as the lead counsel in *Roe v. Wade*, Ms. Sarah Weddington. See Wright, *supra* note 10, at 2-3. Weddington also actively aided chairman Wright in publications related to the Code. *Id.*

58. As such, the disciplinary rules “functioned as a statute defining the legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law.” Hazard, *supra* note 7, at 1251.

trol?”⁵⁹ Unable or unwilling to engage this question, the Wright Committee devised an alternative to direct confrontation: it created a system to ignore such differences and attempt to insulate the workplace from value pluralism. Specifically, the drafters of the Model Code (1) separated ethical considerations from a “floor” of acceptable conduct (known as disciplinary rules), thereby removing any mandatory discussion of morality (as opposed to legality) from general discourse or debate on the bar level, and (2) strengthened and operationalized a commitment to neutral partisanship that facilitated the removal from the workplace of lawyers’ identities as people with moral viewpoints.⁶⁰

The Committee’s work culminated in a draft of the Model Code that was approved by the ABA House of Delegates in the summer of 1969 and went into effect in 1970.⁶¹ The Model Code was a significant structural departure from the Canons: it was regulatory in nature and bifurcated for the first time rules from ethical considerations.⁶² Instead of a prosaic format, the Wright Committee structured the Model Code in statutory-style tiers. The Code grouped rules according to nine “Canons,” that “are basic to the proper functioning of the legal profession in modern society.”⁶³ Each Canon had a one-sentence-long overarching statement that began with the discretionary qualifier “A lawyer should” and then proceeded to a statement such as “assist in preventing the unauthorized practice of law” or “assist in maintaining the integrity and competence of the legal profession.”⁶⁴ Following each of the header-style Canons were binding mandatory “Disciplinary Rules” (DRs)—created, as their name suggests, to discipline⁶⁵—and accompanying, non-binding “aspirational” “Ethical Considerations” (ECs) that were provided for guidance.⁶⁶

59. Sutton, *supra* note 6, at 260 (official reporter for the Code writing on reasons supporting the Code’s development).

60. In drafting the Model Code, the Committee deliberately sought “a complete separation . . . between the inspirational and the proscriptive,” which they viewed as a “substantial improvement.” Wright, *supra* note 10, 17; *see also* Sutton, *supra* note 6, at 260 (“The creation of the ethical considerations-disciplinary rules bifurcation ends the structural difficulty. Now it can be stated that the *law* providing specific, authoritative standards for the advocate includes the disciplinary rules.”).

61. *See* GILLERS & SIMON, *supra* note 19, at 617.

62. *See* LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 46 (3d ed. 2012); Hazard, *supra* note 7, at 1249-60; Sutton, *supra* note 6, at 258.

63. *See generally* MODEL CODE OF PROF’L RESPONSIBILITY Table of Contents (1980).

64. *Id.* at Canon 1, 3.

65. *See* Sutton, *supra* note 6, at 258.

66. *Id.* (stating that ethical considerations “are designed to ‘appeal to the reason and understanding of the lawyer’ and to give guidance in those areas in which the lawyer is free to exercise his own conscience without compulsion of law” (quoting John F. Sutton, Jr.,

The Model Code quickly became the default measure of attorney misconduct in federal courts; within a year of being presented to the ABA, seventeen states had adopted the Model Code, and the large majority of remaining states soon fell in line.⁶⁷

Reformers heralded the Model Code as a moderate victory.⁶⁸ In retrospect, the Model Code that emerged in 1969 has been viewed as an improvement from the preceding Canons.⁶⁹ To many commentators then and now, the Model Code facilitated modern practice and the diversifying demographic composition of the bar by increasing transparency, modifying rules to allow more flexibility regarding referrals and advertising,⁷⁰ and discussing a commitment to pro bono work.⁷¹ The overall tone of the Model Code, particularly the preamble, echoed with civic aspirations.⁷² The Model Code remained at play until the mid-eighties when its replacement, the ABA Model Rules of Professional Conduct, was adopted by the ABA and eventually most states.⁷³ The Model Rules, like the Model Code before it, are code-like, legally enforceable, and also set a baseline of lawyer conduct grounded in neutral partisanship.

III. CODIFICATION AND STRUCTURE

The advent of the Model Code was a watershed moment for American legal ethics. With it, the American bar eschewed a duty to engage in broad discussions of the lawyer's moral role in civil society for a limited inquiry into what the proper regulatory rules should be to

Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint, 33 TENN. L. REV. 132, 133 (1966))).

67. See LERMAN & SCHRAG, *supra* note 62, at 46; Wright, *supra* note 10, at 1.

68. See Papke, *supra* note 17, at 43. See generally Sarah Ragle Weddington, *A Fresh Approach to Preserving Independent Judgment—Canon 6 of the Proposed Code of Professional Responsibility*, 11 ARIZ. L. REV. 31 (1969) (praising rules delineating lawyers' duties of loyalty).

69. See LERMAN & SCHRAG, *supra* note 62, at 46-47 (noting that "the Model Code, however, was an important advance"); Sutton, *supra* note 6, at 266 ("[T]he Code of Professional Responsibility represents (in my perhaps biased judgment) a giant step forward in the efforts of the legal profession to improve its ethical climate.").

70. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B), (D), (I) (1980); *id.* at DR 2-103(B), (D); *id.* at DR 2-140(A). Note, the greatest changes in this area came in subsequent revisions in response to the Supreme Court's ruling that lawyer advertising received First Amendment protection as commercial speech in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

71. See *id.* at DR 2-101(B), (D), (I); *id.* at DR 2-103(B), (D); *id.* at DR 2-140(A).

72. See *id.* at Pmb1.

73. See GILLERS & SIMON, *supra* note 19, at 617. The Model Code was superseded by the *Model Rules of Professional Conduct* (Model Rules), which were adopted by the ABA in August 1983. See *House of Delegates Proceedings*, 108 ANN. REP. A.B.A. 763, 778 (1983).

monitor day-to-day legal practice.⁷⁴ This moment was pivotal because it officially relegated issues of morality and lawyering to the “academic” or “personal” sphere and deemed such discussions irrelevant, inappropriate, or even illegitimate in the context of the practicing bar.⁷⁵ While the rules did not bar discretionary consideration of morality, there was no requirement to weigh morality. The moral status quo became the elephant in the room, obscured by the immediate mandatory task of complying with disciplinary rules.⁷⁶ Codification is often associated with transparency and its attendant virtues: open access, due process, and competition of ideas.⁷⁷ Less emphasized, however, is the impact of codification on operationalizing and enforcing norms that were previously unenforced.⁷⁸ Enter the Model Code.

A. *Rules Adopted; Ethics Orphaned*

The Model Code’s structure renders discussions of ethics and professional conduct conceptually and practically distinct.⁷⁹ The Code prioritized conduct rules over obligations to consider ethics. Conduct rules received the distinction of being enforceable and therefore im-

74. See LERMAN & SCHRAG, *supra* note 62, at 46 (“The codification of the law governing lawyers in the 1960s marked a major change in the structure and content of the ethical rules.”); Hazard, *supra* note 7, at 1251 (“The transformation of the norms of professional conduct [into an enforceable legal code] was principally effected by the ABA’s Code of Professional Responsibility in 1970.”).

75. This is not to say that discourse under the Canons actually centered more on substantive ethics. Certainly we have no evidence of a robust moral dialogue happening at the bar level under the Canons. In fact, there is scholarship indicating that civic-mindedness was actually in short supply. See generally Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397 (2003). The key difference with the Code, however, is that the Canons aspired to a notion of professional behavior that included and expected discussions of morality, regardless of whether those ideals were in fact realized.

76. See Hazard, *supra* note 7, at 1249 (“[T]he legal profession’s narrative and the core ethical rules, as pronounced in the 1908 Canons, has been preserved However, the form in which those rules are expressed has changed dramatically. What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations.”).

77. Indeed, according to the Committee Chair Wright, the shift to the Code format in the Model Code was partially animated by a desire to create a fair system to incorporate new members into the established norms of the legal profession: “The Rules are drafted in the form of statutes with specificity and clarity sufficient to meet due process requirements of disciplinary actions.” Wright, *supra* note 10, at 2.

78. See Hazard, *supra* note 7, at 1250-51 (noting that integrating the bar as an aegis of the courts allowed for “intensified disciplinary enforcement, including the sanctions of disbarment and suspension”).

79. This distinction and the inclusion of ethical consideration with rules may have been inspired by the Joint Conference Report, which noted that “[u]nder the conditions of modern practice it is particularly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards.” Fuller & Randall, *supra* note 26, at 1159.

portant.⁸⁰ By structurally bifurcating ethical considerations from the disciplinary rules, the Model Code made clear that ethical issues (to the extent that they were discussed at all) were non-binding and “aspirational.”⁸¹ In adopting this format, the Model Code set the stage for minimizing discussions of morality among practicing lawyers and law students. Post-Model Code, the lawyerly inquiry is not “What is the right thing or the professional thing to do?” but “Do the Disciplinary Rules sanction doing or not doing A, B, or C?”⁸² Morality is relegated to an issue of private contemplation, rather than a topic for group analysis.⁸³ As such, the Model Code denied new entrants to legal practice the opportunity to discuss and change the moral norms governing lawyering as a whole. Instead, professional discourse focused on the floor provided by regulatory rules, rather than the moral ceiling.

In doing so, the bar was able to avoid a plurality of views concerning a lawyer’s core ethical duties (thus side-stepping the Wright Committee reporter’s question, “*whose* conscience and *whose* ethical standards are to control?”⁸⁴). Instead, it froze the conversation as it stood. Bifurcating moral issues from professional conduct allowed current members of the bar to avoid uncomfortable conversations with dissimilar colleagues. Meanwhile, discussions of the moral role of lawyers and related duties to society would become increasingly complicated as the bar diversified.

80. See MODEL CODE OF PROF’L RESPONSIBILITY Preliminary Statement (1980).

81. See Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 411 (2005) (arguing that the goals of the Model Code and Model Rules’ “‘minimalist’ project” and the “‘broadly ethical’” project conflict and therefore “failed largely because the profession has divided what was once the single unifying goal for bar associations and lawyer regulators—providing moral, ethical, and practical guidance on how to practice law—into two quite distinct, and in some ways contradictory goals, thus undercutting the entire project”); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 41-46 (1995) (arguing that the regulatory focus of the codes has removed morality from ethics).

82. See Hazard, *supra* note 7, at 1241.

83. Some would argue that moral discussions still happen but in relation to the content of the rules, if not generally. I agree that (as with any law or code) moral arguments may be raised in questioning the legitimacy of rules governing lawyer conduct. However, these critiques center on the moral value of the specific rule at issue, and there is no requirement that morality be discussed generally amongst the bar or with clients or that morality be reflected in the rules or conduct. Law often has a disconnect with moral judgment. But we do not call law ethics. Moreover, discussions regarding the reform of rules will happen predominately in bar committees and subcommittees and in some cases among regulators (Sarbanes-Oxley and related reforms), the elite, or academically inclined, not amongst lawyers generally.

84. Sutton, *supra* note 6, at 259-60 (official reporter for the Code writing on reasons supporting the Code’s development).

For example, a key point of contention facing the legal community in the 1960s was the moral legitimacy of civil disobedience. During the same years when the Wright Committee met and drafted the Code, both ABA President Powell and former Justice Whittaker (a member of the Wright Committee) spoke publically against civil disobedience as a means of social change.⁸⁵ Instead, they called for stronger government enforcement of criminal laws. One of their concerns was that a rise in disrespect for the law and general lawlessness would undermine "the good order and morality of our society."⁸⁶ Whittaker in particular was skeptical of demonstrations and questioned the motivations of civil rights protesters. He argued that "certain self-appointed racial leaders, doubtless recalling the appeasements and, hence, successes of that earlier conduct, have simply adopted and used those techniques in fomenting and waging their lawless campaigns which they have called 'demonstrations.'"⁸⁷

Justice Whittaker stated that "we must always strive to eliminate injustice and discrimination."⁸⁸ However, he disagreed with non-violent civil disobedience demonstrators about how to achieve that goal. He argued that "we must do so by orderly processes in the legislatures and the courts, and not by defying their processes and actions, nor by taking the laws into our own hands."⁸⁹ Tellingly, Justice Whittaker's writings on the subject lack awareness of institutional bias. He urged minorities to make use of the court system without acknowledging that the laws to which minorities are expected to show allegiance were often formed without their input and in violation of fundamental constitutional and moral principles.⁹⁰ Likewise, there is no apparent cognizance of how judicial entities themselves are entrenched in their own norms, norms that may foreclose the possibility of meaningful redress through conventional legal processes. Rather,

85. Concerned about civil disobedience's ability to "seriously threaten the breakdown of law, order, and morality," Charles Whittaker, in an address originally given to the Tennessee Bar Association, called for "impartial, evenhanded, vigorous, swift and certain enforcement of our criminal laws, and the real and substantial punishment thereunder of all conduct that violates those laws," 111 CONG. REC. 15101-03 (1965) (introduced into the record by Sen. Strom Thurmond); *id.* at 15103 (arguing that "[n]o 'end' . . . however worthy [can ever] justify resort to unlawful means" and that "America needs a genuine revival of respect for law and orderly process . . . a new impatience with those who violate and circumvent the laws, and a determined insistence that laws be enforced" (alterations in original)).

86. *Id.* at 15102.

87. *Id.*

88. *Id.* at 15101-03.

89. *Id.* at 15103.

90. *See id.*

Justice Whittaker argued that complying with the law and upholding legal institutions is the sole legitimate path to effectuate change.⁹¹

In the above example, the moral inquiry asks whether a lawyer owes a moral duty to follow the law even when the law is unjust. Members of the Committee viewed this as a potential clash, one where some lawyers would be more willing to assert that unjust laws are not entitled to automatic compliance. Such lawyers could argue that compliance with an unjust law is, in fact, immoral. Under the Model Code, practicing lawyers need not have this discussion or resolve this issue with their colleagues. The focus on the disciplinary rules made clear that lawyers need only discuss what is proper conduct in the service of clients, not whether or not clients ought to be prioritized over other societal obligations or whether lawyers should in fact consider the morality of the laws they are instrumental in implementing.

The avoidance of moral discussions in the professional context has continued to this day. The discussion of legal ethics in law schools is almost entirely rule-based.⁹² “Legal Ethics” as a course name is often a misnomer for continuing legal education and law school courses that teach not frameworks for considering the moral implications or obligations of practice, but, rather, teach the predominantly code-based law of lawyering.⁹³ To the extent that lawyers consider the bounds of their duties to society, their clients, and the legal system, it is primarily, and perhaps only, in terms of complying with formal laws and regulations.⁹⁴ From the ratification of the Model Code on-

91. See *id.* (“We must . . . seek redress in the courts rather than in the streets.”).

92. This is partially due to the sweeping mandate of the ABA’s accreditation provisions for the mandatory ethics course in law school which requires treatment of “the history, goals, structures, values, and responsibilities of the legal profession and its members.” A.B.A., THE 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 302(a)(5), at 15 (2012).

93. In required CLE and law school courses on “legal ethics” there is little need, and certainly no requirement, to discuss morality. Of a survey of thirty-one textbooks on the subject of legal ethics and professional responsibility on the current market in 2013, fewer than half even use the term “ethics” in their titles. See also Maksymilian Del Mar, *Beyond Text in Legal Education: Art, Ethics, and the Carnegie Report*, 56 LOY. L. REV. 955, 976-77 (2010) (noting that professional responsibility and ethics courses in law school do not address moral concerns but focus instead on the regulation of law practice); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 649 (1985) (“Legal ethics should be taught as ethics, not as etiquette or statutory exegesis. Law school courses and bar examinations that demand rote memorization of official standards merely trivialize the subject matter.”).

94. The Multistate Professional Responsibility Exam, which is required for entrance to the bar in most states, tests most heavily on the Model Rules of Professional Conduct and ABA Model Code of Judicial Conduct. *Overview of the MPRE*, NAT’L CONFERENCE OF BAR EXAM’RS, <http://www.ncbex.org/about-ncbe-exams/mpre/overview-of-the-exam/> (last visited Feb. 12, 2015).

wards, the term "ethics" is not even in the titles of the ABA rules governing the legal profession.⁹⁵

The division of ethics from rules in the Model Code presented morality as an issue outside of the lawyer's professional responsibility or training, a personal discretionary issue, without a clear place in professional discourse or the workplace. While the Canons' moral validity was highly flawed,⁹⁶ the ideal of lawyering perpetuated by the Canons required a consideration of moral issues. An attorney could not be a good lawyer and fail to consider (and act on) morality.⁹⁷ In contrast, the neutral-partisan model in the Model Code and in the Model Rules today allows an individual to be a good lawyer and not weigh or act on morality at all. The model of lawyering that comes from the Model Code sets the expectation that lawyers will act as "amoral" agents.⁹⁸ Yes, lawyers can exercise discretion to go above and beyond what is required of them as lawyers and consider morality (as many do). But the fact is that they are not required to. This shift relegated legal ethics qua ethics to the ivory tower of academia and personal, rather than professional, discourse.

Taking moral discussions off the table for lawyers also meant that lawyers unsympathetic to new viewpoints avoided the need to reconsider or modify their own practice. The proper role of lawyers in society was beyond group revision. Moral condemnation of the basic role of lawyer as client conduit was out of place. Instead, the focus on day-to-day conduct allowed the existing bar to shield the client-centric neutral-partisan model from serious attack while focusing discussion on disciplinary rules. This move conceded broad conceptual and moral issues to the status quo. The neutral-partisanship model allowed members of the bar to avoid awkward discussions regarding their personal views with dissimilar colleagues because it assumes that a lawyer's personal morality remains separate from achieving client goals.⁹⁹

95. Compare ABA CANONS OF PROF'L ETHICS (1908), with MODEL CODE OF PROF'L RESPONSIBILITY (1980), and MODEL RULES OF PROF'L CONDUCT (1983).

96. To be clear, this is not a call to reinstate the Canons. Others have called more generally for return to the Canons, whereas I am making a more limited claim. See Barton, *supra* note 81, at 434-36.

97. See *infra* notes 118-21 and accompanying text.

98. As I discuss in detail *infra* Part III, there is no such thing as an amoral lawyer; the amoral lawyering ideal is imbued with rich moral judgments regarding agency, duty, societal norms, and expectations regarding human behavior.

99. It is worth noting that new members to the bar from outside of traditional professional circles are not spared discomfort under this model; rather, their discomfort may be increased in a system where topics available for discussion or redress forgo challenges to moral concerns in the context of professional practice.

B. Enforceability: The Model Code and Discipline

As the demographic composition of the legal profession grew more inclusive, longstanding members of the bar could no longer rely on common experiences of education and upbringing, unspoken norms, or societal connections to predict (and control) the behaviors of other lawyers who moved in different social circles.¹⁰⁰ The Model Code created a national code of conduct with mandatory regulations specifically designed to increase enforceability over parties outside the ambit of the social circles of the existing bar.¹⁰¹ In doing so, the Code “transformed the dominant bar associations directly involved in bar discipline from private clubs into quasi-governmental organs.”¹⁰² As such, the drafting of the Model Code did more than fend off encroachment by the court on traditional self-regulation;¹⁰³ it revealed the existing bar’s increasing skepticism of the rapidly growing lawyer population’s ability to conform to norms without external consequences.

Newly anointed standards were given teeth. In the pre-Code era, “[t]he threat of professional discipline was virtually non-existent, as long as the lawyer did not commit a felony or a similarly egregious offense. The threat of legal malpractice recovery or of a remedy such as disqualification for a conflict of interest was almost as equally remote.”¹⁰⁴ The disciplinary norms changed drastically post-Model Code. The Model Code provided a disciplinary workhorse to keep lawyers in line with dominant lawyering norms, rather than facilitating revision of these norms. Since 1969, lawyer regulation through the bar, courts, and malpractice litigation has risen significantly.¹⁰⁵ While some of this increase can be attributed to doctrinal shifts in

100. The Model Code’s disciplinary rules “functioned as a statute defining legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law.” Hazard, *supra* note 7, at 1241, 1244, 1251, 1260 (going on to note that “[b]y the 1980’s, the bar had become a ‘community’ of strangers”).

101. See Zacharias, *supra* note 7, at 1 (“It was not until 1969, with the advent of the *Model Code of Professional Responsibility*, that American jurisdictions began to take the function of regulating lawyers seriously.”).

102. Wolfram, *supra* note 2, at 217; see also Hazard, *supra* note 7, at 1241 (“[T]he legal profession’s narrative and the core ethical rules, as pronounced in the 1908 Canons, has been preserved and largely unchanged However, the form in which those rules are expressed has changed dramatically. What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations.”).

103. In the 1960s there was increased pressure from courts on the self-governance norm as they increasingly took an increased interest in shaping the profession’s governing rules. Hazard, *supra* note 7, at 1242.

104. Wolfram, *supra* note 2, at 207.

105. “While the absence of meaningful records precludes the generation of statistics of the extent of lawyer discipline prior to 1970, my distinct impression, in agreement with the bar’s self-assessment, is that there was much less regulation compared to today.” *Id.* at 206.

third party standing,¹⁰⁶ the growth of a plaintiffs' legal malpractice bar may also indicate a sense that the presence of a law-like code clarified the breach standards needed for conformity with the customs of the profession. More than forty years later, lawyers now comprise a highly regulated profession subject to direct statutory regulation and self-regulation as well as various common law regulations.¹⁰⁷

IV. STANDARDIZING THE STANDARD CONCEPTION

The previous sections established a history of ideas—why neutral partisanship was adopted as a dominant model for lawyering in modernity (to facilitate pluralism) and what form that adoption took (the bifurcation of rules from ethics). The historic roots of the Model Code indicate a perceived need to avoid conflict and excise debates about morality from the legal profession in order to facilitate demographic plurality at the bar. This Part explores the conceptual and practical shortcomings of that choice by problematizing arguments that neutral partisanship is (1) anti-hierarchical and pro-client and (2) neutral to moral judgments.

The Model Code does not (and cannot) remove moral judgment from the code. Rather, by adopting and strengthening a commitment to neutral partisanship, the Model Code preserved the moral choices that predated the Code and limited the ability to change or alter those choices moving forward. Despite its appeal to universality, neutrality is not neutral. It favors one approach to lawyering over all others.¹⁰⁸ Because it is viewpoint specific but does not facilitate dialogue on the content of that viewpoint, neutral partisanship deemphasizes and delegitimizes the individual moral contributions of new diverse lawyers by limiting value pluralism.

As such, the desire to avoid conflict in the bar did not eliminate moral conflict. Instead, the Model Code pushes conflict out of sight, where it is harder to investigate. Such suppressed struggles cause

106. See, e.g., *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

107. See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102 (1995) ("Increasingly, professional ideals have been turned into enforceable law, and self-regulation by the organized bar has become regulation by courts and legislatures."); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1275 (1995) (noting that the existence of disciplinary regulation and substantial regulatory law, including "tort law, criminal law, agency law, and securities law," belies the notion that lawyers are self-regulating); Wolfram, *supra* note 2, at 206; Zacharias, *supra* note 7, at 1 ("The publication of the *Model Code of Professional Responsibility* was a watershed event beginning a flood of ethics regulation that has yet to subside.").

108. For example, neutral partisanship leaves little room for lawyering rooted in empathy, care, and emotions. See generally Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

significant harm to lawyers as individuals as well as to relationships between lawyers and between lawyers and clients. Neutral partisanship is also ill-suited to help a diverse bar that services diverse clients to negotiate real moral and practical dilemmas. This Part concludes that the Model Code, as the basis of our modern legal ethics system, does not adequately respond to demographic and value pluralism. As such, it cannot be justified on the terms of its adoption.

A. *Neutral Partisanship: A Primer*

Neutral partisanship is typically called the “standard conception” of the lawyer’s role, amoral lawyering or, in the pejorative, the lawyer as a “hired gun.”¹⁰⁹ Partisanship is the concept that the lawyer, within the boundaries of the law, “is committed to the aggressive and single-minded pursuit of the client’s objectives.”¹¹⁰ Partisanship exists primarily in adversarial systems.¹¹¹ Neutrality is a distinct concept; it requires that lawyers refrain from moral judgment over the lawful ends of the client or the lawful means used to attain those goals.¹¹²

Under the standard conception, lawyers are “role-differentiated.” This means that lawyers must confine their individual moral views to their personal roles in life (outside of the workplace).¹¹³ Ideally, law-

109. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW 26 (1854); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980); Wolfram, *supra* note 2, at 210 (describing client-centric lawyering as “the bedrock of modern professional orthodoxy”).

110. TIM DARE, THE COUNSEL OF ROGUES?: A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE 5 (2009).

111. This Article does not interrogate the adversarial or partisan nature of the standard conception’s “neutral partisan” norm, but instead focuses on the neutrality aspect of this concept. Many scholars have critiqued the pitfalls of partisanship and particularly the use of the adversarial system. *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19-64 (2007) (revising Luban’s 1983 essay and critiquing the premise that the adversarial system better pursues truth or the client’s interest); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). *But see* MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 9, 12 (1975) (championing the adversary system as protective of individuals’ fundamental rights and emphasizing the importance of partisanship and neutrality); STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984) (advocating for the adversary system). However, these concepts are analytically distinct: concepts of partisanship and neutrality need not be married with one another. This Article focuses on problems imbedded with neutrality and role morality, not partisanship.

112. *See* Postema, *supra* note 109, at 73. For views critical of this approach, *see* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247 (1985); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

113. *See, e.g.*, Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15-16 (1951) (“[Lawyers] are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy. We are talking about the special moral code which governs a

yers leave their professional role devoid of moral judgment and remain preoccupied only with questions of legality.¹¹⁴ As such, neutral partisanship provides moral non-accountability for lawyers: the client, not the lawyer, is culpable for the moral worth of ends sought in a representation.¹¹⁵ Many refer to this concept as “role morality” since morality, or at least moral accountability, is cabined to specific roles.¹¹⁶ Neutral partisanship in some form is a time-honored concept, one that some scholars trace back as far as the early 1800s.¹¹⁷

The Canons’ version of neutral partisanship was qualified and favored lawyers employing their own morality in the context of client advocacy. While the Canons required lawyers to act as zealous advocates for their clients, they also cautioned that a lawyer “must obey his own conscience and not that of the client.”¹¹⁸ The Canons reminded lawyers that “no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.”¹¹⁹ Moreover, under the Canons, a lawyer had a duty to “impress upon the client and his undertaking exact compliance with the strictest principles of moral law.”¹²⁰ The Canons concluded that a lawyer finds their “highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic citizen,” not exclusively in the service of a client.¹²¹

The Model Code, in contrast, made a much stronger commitment to neutral partisanship.¹²² In it, the Wright Committee sought to eliminate what it perceived as a key “dilemma” imbedded in the Can-

man who is acting for another. Lawyers in their practice—how they behave elsewhere does not concern us—put off more and more of our common morals the farther they go in a profession which treats right and wrong, vice and virtue, on such equal terms.”).

114. See David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 673-74 (2012) (describing the position of W. Bradley Wendel in *Lawyers and Fidelity to Law* regarding the proper role of a lawyer).

115. See Pepper, *supra* note 11, at 614 (“[C]onduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson. . . . [I]t is the client who is morally accountable, not the lawyer.”).

116. Luban, *supra* note 114, at 674 (noting that the central question regarding role morality is, “how can it be that her professional role might require a lawyer to do things that would be morally forbidden to a non-lawyer?”).

117. DARE, *supra* note 110, at 6 (2009) (discussing Lord Brougham’s famous speech in defense of Queen Caroline, pronouncing that in the discharge of his duty a lawyer “knows but one person in all the world, and that person is his client”).

118. *Final Report*, *supra* note 18, at 579.

119. *Id.* at 582.

120. *Id.* at 584.

121. *Id.* at 584.

122. See Papke, *supra* note 17, at 43 (“[F]ramers of the code reasserted the responsibility of individual lawyers to individual clients. Established ethical presumptions died hard.”).

ons: “whether to represent [a lawyer’s] client in accordance with [the] law or in accordance with the lawyer’s own moral viewpoint.”¹²³ While the official reporter of the Model Code, John Sutton, admitted that there was “considerable professed support” for the view that a lawyer should “obey his own conscience,”¹²⁴ he dismissed it as a “standardless maelstrom” governed by “whims, prejudices, emotional caprices, and predilections.”¹²⁵

The Model Code avoided this concern by making only very limited mention of moral responsibility on the part of lawyers. These mentions appear in the non-binding “ethical considerations,” not the mandatory disciplinary rules, where the ethical considerations merely state that it is “desirable” for a lawyer to point out morally just outcomes to clients.¹²⁶ The clients themselves decide the course of action. This side-steps a lawyer’s moral accountability.¹²⁷ For example, some scholars have argued that the Model Code forbids trial lawyers to even express an opinion as to the moral value of their client’s case.¹²⁸ Even in the area of deciding whether or not to take on certain clients, where lawyers under the Canons had previously enjoyed an unqualified right to refuse clients,¹²⁹ the Model Code admonished such behavior. It declared that “a lawyer should not lightly decline proffered employment.”¹³⁰

Additional commitments to client-centric neutral partisanship are clear in several sections of Model Code. One of the mandatory disciplinary rules states that “[a] lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.”¹³¹ Canon 7 of the Model Code, although not binding in the way the Disciplinary Rules are, reiterates this approach: “A lawyer should represent a client zealously within the boundaries of the law.”¹³² In the non-binding “ethical” authorities, lawyers are advised that “[t]he professional judgment

123. Sutton, *supra* note 6, at 260.

124. *Final Report*, *supra* note 18, at 579.

125. Sutton, *supra* note 6, at 259.

126. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1980) (“A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”).

127. *See id.* at EC 7-8, 7-9.

128. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 393 (1988).

129. *Final Report*, *supra* note 18, at 583-84 (which emphasizes a lawyer’s “right to decline employment”).

130. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-26 (1980).

131. *Id.* at DR 7-101(A)(1).

132. *Id.* at EC 7-1.

of a lawyer should be exercised . . . solely for the benefit of [the lawyer's] client and free of compromising influences and loyalties."¹³³

B. *A Modern Moral Justification of Neutral Partisanship*

Traditionally, champions of neutral partisanship defend it in pragmatic terms by arguing that neutral partisanship upholds the integrity of the adversarial system.¹³⁴ Under these types of arguments, a lawyer must take a neutral role as an advocate for her client in order to ascertain the truth and safeguard the public interest in the institutional integrity of the overall legal system.¹³⁵ This view argues that allowing lawyers to exercise moral autonomy and judge the goals of the client's lawsuit undermines the functioning of the adversarial judicial system as a whole, either by usurping the roles of the judge and jury or by undermining the system's ability to fact find.¹³⁶ In its briefest form, such proponents argue that an adversary system founded on neutral partisanship is the best way to ensure that truth is found and that cases are judged on their merits.¹³⁷ A more cynical argument holds that neutral partisanship is simply a quid pro quo bargain for retaining a monopoly over professional legal services.¹³⁸

All of these justifications and critiques of neutral partisanship are premised on the basic assumption that existing institutions of law, justice, and government are legitimate themselves and worth protecting. However, in the late sixties and seventies, when the Model Code was written and ratified and subsequent iterations of national rule-making were underway, skepticism of such institutions was wide-

133. *Id.* at EC 5-1.

134. See FREEDMAN, *supra* note 111, at 9, 12 (championing the client-centric adversary system as protecting the fundamental rights of individuals and emphasizing the importance of partisanship and neutrality); LANDSMAN, *supra* note 111 (advocating for the adversary system). See generally *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981) ("[Our] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.").

135. See Papke, *supra* note 17, at 38 ("Sharswood argued that the lawyer was not responsible for the social utility of the cause he represented. If the lawyer began judging cases on his own, he would be usurping the powers of judge and jury who, more so than lawyers, carried a responsibility to the public at large.").

136. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10-11 (1975) (contending that "[i]f lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers").

137. See Fuller & Randall, *supra* note 26, at 1160-61.

138. See Pepper, *supra* note 11, at 616.

spread.¹³⁹ Justifications predicated on protecting existing institutions and on the moral integrity of such instructions were questionable—perhaps even untenable. Instead, another moral justification of neutral partisanship was necessary—one resting on contemporary political ideals such as equality, diversity, and individual access to power. It is on these bases that neutral partisanship needed to stake its claim in order to solidify its position as the default model of lawyering in modern America.

Responding to the political and social climate of post-sixties America, modern moral justifications for neutral partisanship emerged grounded in the language and causes of the civil rights movement: individual rights, diversity, and equality.¹⁴⁰ This moral footing for neutral partisanship is best articulated in Stephen Pepper's seminal article *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*.¹⁴¹

In the amoral lawyering account, neutral partisanship forwards the cause of the disenfranchised better than a morally active lawyer role because it allows the voice of the client to achieve its full legal ends unimpeded by the lawyer's own moral viewpoint.¹⁴² Since these values had inherent moral worth, so too did a role of lawyering conceived to protect such interests.¹⁴³ A lack of sophistication on the part of many clients justifies the lawyer's amoral role:

139. See Andrew Kohut, *Forward* to PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *DECONSTRUCTING DISTRUST: HOW AMERICANS VIEW GOVERNMENT* (1998) (noting how in the sixties and seventies a "healthy skepticism" toward government "deteriorated into an outright distrust").

140. See Pepper, *supra* note 11, at 613 (stating that neutral partisanship is morally justified, "primarily upon the values of individual autonomy, equality and diversity"). For the purposes of this Article, I ask the reader to take as given that the ideals of individual autonomy, equality, and diversity are moral goals. While I realize that the moral worth of each of these is subject to debate, this Article considers, if we take Professor Pepper's categorization of these goals as valid, what does and should follow. See *generally* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 20 (1988) ("[A]utonomy is . . . a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.").

141. Pepper, *supra* note 11, at 613. Professor Pepper's article is a cornerstone of the modern legal ethics canon. A recent search of LexisNexis revealed that, in addition to being cited in numerous legal ethics anthologies and textbooks, Pepper's article has been cited over three hundred times since 1986.

142. Pepper is concerned that lawyers will act as "moral screens" obscuring client autonomy. *Id.* at 621.

143. Staunch individualism has a long history in American political mythology. The Model Code's own opening sentence states that "[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law

[U]nfiltered access to the law is then available only to those who are legally sophisticated and to those able to educate themselves sufficiently for access to the law, while those less sophisticated—usually those less educated—are left with no access or with access that subjects their use of the law to the moral judgments and veto of the lawyer.¹⁴⁴

Under this view neutral partisanship is necessary in a pluralistic society to safeguard the masses from the oppressive oligarchy of the lawyer class.¹⁴⁵ Justifying neutral partisanship in these terms presented reform-minded lawyers with an argument in favor of strict role differentiation rooted in their own values. The idea that different views and parties would coexist best by seeking a neutral baseline for lawyer conduct has a certain intuitive appeal.

Proponents of neutral partisanship, in service of pluralism, equality, and diversity argued that in a pluralistic society moral lawyers not only may, they *must* differentiate their personal selves from their professional ones in order to allow various client views to filter into the system: “The lawyer is a good person in that he provides access to the law; in providing such access without moral screening he serves the moral values of individual autonomy and equality.”¹⁴⁶ Since “liberty and autonomy are a moral good,” so too is neutral partisanship, which is “better than constraint.”¹⁴⁷ Under this theory, if given a choice, diversity and autonomy are so morally valuable that they trump general pursuits of “right” or “good” conduct.¹⁴⁸ Thus, “[f]or access to law to be filtered unequally through the disparate moral views of each individual’s lawyer does not appear to be justifiable.”¹⁴⁹

However intuitive, this assertion fails upon closer scrutiny. Client-centric neutral partisanship cannot be adequately justified in terms of defending client autonomy, equality, or diversity since it ultimately undermines each of these concepts in important and irreconcilable

grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.” MODEL CODE OF PROF’L RESPONSIBILITY Pmb1. (1980).

144. Pepper, *supra* note 11, at 619.

145. *See id.* at 617 (arguing that neutral partisanship facilitates a diversity of clients to play out their individual autonomy in an unimpeded fashion without “substitut[ing] lawyers’ beliefs”).

146. Pepper, *supra* note 11, at 634.

147. *Id.* at 616.

148. In Professor Pepper’s view, equality of access to law is also a “significant value” worthy of such extreme protection and one that the neutral-partisan model champions. *Id.* at 616.

149. *Id.* at 618.

ways.¹⁵⁰ The following sections examine these shortcomings both conceptually and pragmatically.

C. *Neutral Partisanship as a Vehicle for Client Autonomy*

The idea that exercises of individual autonomy in accordance with law are an unequivocal moral good is a subject of debate. One danger of this assertion is that it “would conflate the morality of the action with the morality of autonomously having chosen it.”¹⁵¹ Professor David Luban notes this is particularly problematic because “some things [that are] legally right are not morally right.”¹⁵² In contrast, amoral lawyering “assumes that the morality is already in the law, that in any important sense anything legally right *is* morally right.”¹⁵³ In order for this to be true, neutral partisanship under the amoral lawyering view would carry an extreme libertarian view that any infringement on individual freedom is so morally repugnant as to outweigh the moral downfalls of the content of that act.

Additional arguments regarding the modern amoral lawyering rationale are grounded in practice; even if an individual makes a choice for a given outcome, if the ability to reach that outcome is fundamentally compromised by her relationship with her lawyer, then the client’s exercise of autonomy does not exist in any meaningful way.¹⁵⁴ This section contends that regardless of perfect access to amoral law-

150. See, e.g., W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 4, 11 (2010) (arguing that a modified version of neutral partisanship that places fidelity to legal entitlements rather than client interests is essential in a value pluralistic society since law represents “a provisional settlement of these controversies, to enable cooperative action in response to some collective need” and that “[t]here is moral value in doing one’s part to support a socially valuable institution”). I reserve discussion of the issue of whether this modified version of neutral partisanship would succeed in terms of defending pluralism and focus here on assessing the more conventional version of neutral partisanship at play in the Model Code and incorporated into subsequent rulemaking.

151. *Id.* at 33.

152. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. B. FOUND. RES. J. 637, 638 (1986) (“[S]ome things legally right are not morally right.” (quoting Abraham Lincoln)).

153. *Id.*

154. For the purposes of this Article, I will assume, as most legal ethics codes do, that good lawyering includes loyalty to one’s client as well as communication and candor between the lawyer and her client. As of July 2014, all jurisdictions in the United States include provisions that outline a duty of loyalty, communication, and candor towards clients in some form. It is a matter of live dispute, however, whether such duties, or any duties, should run to clients versus the law, human dignity, or an overall sense of substantive justice. The amoral lawyering stance discusses individual autonomy in terms of clients, and therefore this Article will approach the standard conception from the point of view that is now, in the post-Code era, most widely accepted—a client-centric model.

yers, the neutral-partisan ideal would continue to be suspect under justifications grounded in diversity, equality, and individual autonomy.¹⁵⁵

1. *Candor, Loyalty, and Effective Client Service*

Many would include zeal as an essential element of good lawyering.¹⁵⁶ Here lies an inherent weakness in neutral partisanship: it undermines loyalty and the trust of clients in their lawyers. This inhibits the ability of lawyers and clients to have a relationship with a meaningful implementation of loyalty, communication, and candor.¹⁵⁷ By being willing, for pay, to set aside one's personal principles and views, lawyers undermine their moral standing and forfeit credibility with laypeople.¹⁵⁸ Then, those same laypeople are put in the uncomfortable position of having to trust a party they know to be, by all typical standards, untrustworthy. Without the candor that comes with trust, a lawyer cannot build an effective case and relationship with a client. Thus, the amoral lawyering model frequently handicaps a lawyer from effective practice and even client service.

The idea that clients can exercise unimpeded autonomy through a neutral-partisan model of lawyering is undercut by the relationship between trust, empathy, and candor.¹⁵⁹ People come to lawyers in times of great vulnerability, often when something of critical importance in their lives is awry.¹⁶⁰ Clients want to trust their lawyers.¹⁶¹ Yet a lawyer who complies with her duties as delineated by

155. I concede that in a non-adversarial system, neutrality might be more defensible. This Article argues within, and to some extent assumes as given, our current system—an adversarial one grounded in client-centric work. For the reasons hinted at below, I have serious concerns about the moral worth of non-adversarial judicial systems in deliberative democracies, though I would agree with other scholars that client focus should potentially yield to other loyalties and is likely better conceptualized as a duty “to protect the legal entitlements of clients, not advance their interests.” WENDEL, *supra* note 150, at 6.

156. See, e.g., Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006). But see LUBAN, *supra* note 111, at 19-64 (revising Luban's 1983 essay).

157. See, e.g., Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 522 (2003) (“[T]he lawyer who bites his tongue rather than voice the unpleasant argument against a client's course of action fails more than his own conscience; he fails to fulfill the foundational duty of providing candid legal advice.”).

158. Perhaps this is why the media valorizes lawyers who break with professional ethics and instead comport with expectations of common morality. See Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 386 (1987).

159. The *Oxford English Dictionary* defines empathy as “[t]he . . . power of projecting one's personality into [and so fully comprehending the] . . . object of contemplation.” OXFORD ENGLISH DICTIONARY (2d ed. 1989). Since lawyers, under a neutral-partisan ideal, seek to treat their personal selves as irrelevant, empathy is out of place.

160. See Pepper, *supra* note 11, at 615.

161. See generally COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* (2009) (citing

the Model Code can greet them with a complete lack of sympathy or empathy—in fact, they are expected to do just that. Lawyers, by separating their personal selves strictly from their professional selves, appear “heartless,” only in the representation to receive fees and therefore only looking out for their own personal material interest.¹⁶² A lack of aligned interests may also impact the ability of a lawyer to engage in competent representation. If a lawyer believes in the case of her client, then she is genuinely motivated to be timely, diligent, and creative and to work hard to reach the client’s goals. Alignment of interests may also support competency, as “[t]here are severe limitations on the extent to which a person, particularly a stranger, can understand with any depth the ends of another without actually sharing those ends.”¹⁶³ But instead of expecting lawyers only to take on cases that comport with their ordinary moral views, lawyers are expected to represent all clients zealously without believing in the outcomes of their cases.

2. *Codifying Trust: The Model Code’s Bind*

Neutral partisanship creates the situation where the Model Code must artificially attempt to emulate qualities of actual loyalty-based relationships through piecemeal rubrics. The Model Code states that lawyers must be loyal, diligent, and competent with client’s work and represent the client with zeal.¹⁶⁴ The Model Code attempts to deal with the disconnect between role differentiation and traditional loyalty by crafting a set of contorted rules that have only become more painfully strained and convoluted over time. Much of the Code attempts to regulate and create mechanically what can only grow out of a genuine alignment of interests: trust and loyalty.¹⁶⁵

interviews of clients expressing that friendship and trust were at the forefront of what they wanted from lawyers).

162. “Greed” is a common term that arises in public descriptions of lawyers. See Paul F. Teich, *Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence*, 19 TEX. WESLEYAN L. REV. 837, 847 (2013); see also Marianne M. Jennings, *Moral Disengagement and Lawyers: Codes, Ethics, Conscience, and Some Great Movies*, 37 DUQ. L. REV. 573, 575-76 (“[M]oral disengagement still creates an ethical pressure cooker from which there is no release.”).

163. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 59 n.70; see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (emphasizing how a personal relationship between a client and her attorney can enable the exercise of autonomy within the legal system).

164. See MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1980) (client confidences); *id.* at DR 6-101 (competence and diligence); *id.* at DR 7-101 (zeal).

165. See generally *id.* at Canon 6 (laying out detailed instructions regarding conflicts of interest).

However, trust between people is ordinarily predicated on honesty and mutuality. It requires candid disclosure of beliefs and the mutual vulnerability attendant to that disclosure. No amount of mechanical rulemaking can counter the lack of mutual openness in building trust. Therefore, if the legal profession truly believes that client candor is essential to representation in an adversarial system, then a failure to discuss, disclose, and act in keeping with a lawyer's autonomy undermines a key aspect of representation. Clients will trust lawyers who are telling them the truth about themselves and being forthcoming with their views. In contrast, the neutral-partisanship model asks clients to do what lawyers themselves are unwilling to do—be open.

Ultimately, rules can only give assurance to clients who have faith in rules, rule of law, and the fair execution of law. Proxy loyalty is little more than a house of cards built upon certain assumptions regarding human experience: that clients will enter a relationship with a lawyer believing that law and rules are reliable, fair, and justly enforced. For many clients, particularly less enfranchised individuals or non-institutional clients, the inverse view of the reliability of rules and law is just as likely as such faith.

Ultimately, client autonomy is best served by lawyers who genuinely believe in clients and their causes. Neutral partisanship divorces lawyers from this rich sense of loyalty that flows organically from aligned interests. Instead, clients must trust in rule of law, the code of lawyers, and the court to enforce formalistic loyalty. This is not a neutral assumption, it is one made from a point of view colored by experiences with the law as a benign facilitator rather than an obstruction or tool of persecution. Lawyers are expected to act with conviction, but not have actual conviction. This leaves only one active word—lawyers must “act.” Thus, lawyers are expected not only to be advocates, but actors that give convincing imitations of loyalty and candor without conviction. This undermines the profession's stature and credibility in the public eye. By adopting a strong version of neutral partisanship, the Model Code created a perverse system where only clients who are themselves “amoral” (either through role differentiation or an antisocial tendency to aver moral norms) gain the full benefit of an open relationship with their lawyers and full effective representation.

3. Clients and the Knowledge Deficit

Even if the Model Code managed to emulate loyalty effectively, neutral partisanship obscures a lawyer's actual agenda and views, again disadvantaging clients. By allowing lawyers to claim moral distinction from their client's ends, lawyers inhabit a professional iden-

tity steeped in ambiguity. The client ought to be able to choose counsel knowing what her lawyer actually thinks of the moral content of the suit at hand.¹⁶⁶ In a value-pluralistic society, it is likely that a client would find relevant what his lawyer really thinks of the moral validity of his case. However, the current system forces clients to make choices regarding their representation without knowledge of a lawyer's moral view on the substantive issues. The client is required to trust that a lawyer's personal views will not undermine the representation. This impedes, rather than empowers, client autonomy.

The client deserves, and arguably needs, to know what her lawyer believes. It is often vital for clients to know whether or not the lawyer is truly invested in the client's legal goal or only performs a series of mechanically required acts as if she cared about the client.¹⁶⁷ With such information at hand, the client, not the lawyer, can decide whether or not she is comfortable with a lawyer who does or does not share her moral views. This decision ought to lie with the client, at least under a view privileging client autonomy. Right now, only the lawyer knows of this potential disconnect, and the standard conception of lawyering paternalistically decides that this information is not relevant to the client (conveniently allowing an attorney to take on clients with conflicting moral positions for her own financial gain). Rather than allowing a lawyer to determine her impartiality (the fox guarding the henhouse), the rules could require that a lawyer reveal to the client any moral viewpoints on the representation she may have, allowing the client to consider these issues and waive any conflicts should the client feel that the lawyer, nonetheless, would be an excellent advocate.

Under a neutral-partisan system, the service that some clients receive will also be systematically better than that of others. The parties best served by the profession's allegiance to the concept of role morality are those clients who are also disciples of the "neutral partisan" ethos. Clients who share the morally-charged view that parties or entities may separate professional activities from moral accountability are given the privilege (and advantage) of having a lawyer with genuinely aligned interests. But shouldn't ordinary individual cli-

166. It is never possible to have complete knowledge in a given representation, even on the part of a lawyer. See, e.g., Spaulding, *supra* note 11, at 1384 ("[L]awyers know that their advice and advocacy will almost never be based on anything approaching complete knowledge."). However, calculated and sanctioned failure to disclose information is a different matter.

167. Anne E. Thar, *What Do Clients Really Want? It's Time You Found Out*, 87 ILL. B.J. 331 (1999) (reporting that more than skill or knowledge, what clients wanted from a lawyer was to know that the lawyer cared).

ents, unlikely to live in a role-differentiated manner, also have access to the same aligned, zealous representation?

Finally, a principal concern in the amoral lawyering justification of neutral partisanship is that lawyers will infringe on a client's autonomy because of their disproportionate share of power in the relationship.¹⁶⁸ On the basis of this perceived power-differential, neutral partisanship limits the power of lawyers and expands relative client power.¹⁶⁹ While this may have been a genuine concern in the 1960s when the bar itself was filled with wealthy, privileged, predominately white, and generally elite individuals, as the project of diversifying and expanding the bar changed the composition of the bar, this reality may have also changed. The amoral lawyer defense of the neutral-partisan model assumes that (1) clients are less sophisticated than lawyers and (2) that the lawyers are financially independent and therefore are not subject to the client's power of the purse.

Today, neither of these points is clear, particularly in the private sector. Many clients, particularly corporate entities, have more power in both society and in the client-lawyer relationship than their lawyers. Many, if not most, lawyers are not independently wealthy and many are saddled with debt.¹⁷⁰ They are not, by and large, practicing the law solely as a vocation. It is a job and they must make money to live. Therefore, because clients control the money and can withdraw their business and go elsewhere, clients, not lawyers, often have the coercive power in the attorney-client relationship.

D. Defining Neutrality and the Limits of Self: Diversity and Equality

The final modern justifications for neutral partisanship are that it protects diversity and equality.¹⁷¹ However, this attempt is premised on accepting that: (1) neutrality protects those with minority viewpoints from the majority imposing its moral notions and (2) "neutral" rules lack a viewpoint and are impartial. This section questions these assumptions and looks specifically at how they interact with concepts of diversity and equality.

168. See Pepper, *supra* note 11, at 634 ("Because of the large advantages over the client built into the lawyer's professional role, and because of the disadvantages and vulnerability built into the client's role, the professional must subordinate his interest to the client's.").

169. See *id.*

170. See Sam Favate, *Law Students, How Much Debt Do You Want?*, THE WALL STREET JOURNAL LAW BLOG, Mar. 23, 2012, 12:30 PM, <http://blogs.wsj.com/law/2012/03/23/law-students-how-much-debt-do-you-want/> (noting that in the top ten most expensive law schools, "the average student debt was \$147,717 in 2011," and overall for all law schools the average student debt in 2011 was over \$100,000).

171. See Pepper, *supra* note 140.

1. *No One Is Neutral: An Example*

The existence of human neutrality in any form is questionable; no person exists without a viewpoint.¹⁷² Rather, what would neutral qualities of lawyering look like without a background or viewpoint to fill that term with meaning? How can one define diligence or competence without a full human identity, without a background upon which to define such terms? Devoid of a set of experiences that shape her consciousness, a person would be less than human.¹⁷³

Take Professor Pepper's article on neutrality as a case study of imbedded viewpoint specificity; here, Pepper's experiences regarding social structures weaken his ideological arguments regarding the moral worth of individual autonomy and diversity. After raising arguments in favor of the moral worth of amoral lawyering on the basis of protecting unfettered client autonomy, Professor Pepper explains the concern that "many clients will come through the door without much internal moral guidance."¹⁷⁴ According to Professor Pepper, clients' lack of moral guidance is the product of a "secularized society" that lacks "homogenous moral communities."¹⁷⁵ First, this assumes that because a lawyer fails to discern an internal guidance, it is in fact not there. Second, equating morality with immersion in a homogenous moral community is in tension with a commitment to valuing diversity. This statement seems to indicate that pluralism functions as an intermediary step towards a homogenous ideal: a benevolent assimilation process into a brave new homogenous (moral) world. And yet, it is the moral worth of pluralism that buttresses Professor Pepper's argument for much of his article. Many "Americans take their pluralism as a fact to celebrate rather than a problem to be overcome"; however, here the lack of a singular moral vision in a community is viewed as a lack of moral substance.¹⁷⁶

The article goes on to reveal other imbedded assumptions regarding society and its norms and values. In discussing client morality, it paints a nostalgic picture of the past when clients gained their moral

172. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 11 (1989) ("[G]ender-neutral terms frequently obscure the fact that so much of the real experience of 'persons,' so long as they live in gender-structured societies, *does* in fact depends on what sex they are."); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (denying the presence of an "unencumbered" self).

173. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984) (arguing that the self is constituted by a life story with a purpose or "telos").

174. Pepper, *supra* note 11, at 627. It is not without a certain irony that one can imagine that certain clients would feel similarly about the "neutral" lawyers that come through the door seemingly devoid of morality.

175. *Id.*

176. Spaulding, *supra* note 11, at 1389 (discussing how in a value-pluralistic society referencing "ordinary morality" offered little substantive mooring).

footing from “[t]he rural town, the ethnic neighborhood, the church attended for several generations, the local business or trade community.”¹⁷⁷ This is a world far removed from the “urbanized society” of the Model Code.¹⁷⁸ Here the viewpoint provides a key insight: Professor Pepper’s description is ideal to some, while morally oppressive to others. Some may think of rural towns as quiet places where children play safely in the streets, but to others these same neighborhoods and groups were strongholds of provincialism, places where racially restrictive covenants, restrictive zoning, or community norms prevented many people from living productive lives. Many small trade groups (including the nascent ABA) historically excluded minorities and women. However, Professor Pepper’s experiences with these institutions may have led him to be less skeptical of these institutions as sources of morality, despite the fact that other rational thoughtful people may view them as the opposite based on their factual experiences.

Finally, when Professor Pepper asks, “would there have been more social justice, equality, or general welfare if lawyers had altered or withheld services on the basis of their own (largely middle- or upper-class) values?” he reveals not only that he assumes that lawyers are of a certain economic class but that the class to which they belong has some sort of unitary overarching set of beliefs.¹⁷⁹ The answer to his question as phrased may be “no,” but this claim is falsifiable. There is also no reason why the socio-economic class of lawyers need be grounded in a particular narrow set of class values—unless the bar is failing to include people from varied backgrounds. The problem is not that lawyers will screen client values. The problem is that lawyers are a monolithic privileged group legislating over clients with whom they share little or no experience or values. How would we answer the following question: Would there have been more social justice, equality, or general welfare if lawyers from all walks of life represented clients whose legal ends they believed in?

The point here is not to denigrate Professor Pepper’s important scholarship and considerable influence. Rather, it is to point out that even a careful, well-intentioned, intelligent person who is trying to protect diversity, equality, and individual autonomy is unable to set aside the lens through which they interpret the world.

177. Pepper, *supra* note 11, at 627.

178. MODEL CODE OF PROF’L RESPONSIBILITY Preface (1980).

179. Pepper, *supra* note 11, at 620.

2. *Racism Without Racists*¹⁸⁰

Codifying neutral partisanship in the 1960s is not only problematic because the possibility of human neutrality is generally suspect. It is also an issue because neutrality had a particular socially charged understanding at that time. Neutrality, like color-blindness, was an attempt to conceptualize means for achieving social equality in a country of racially and ethnically diverse citizens. This nascent theoretical understanding of how to facilitate equal access to justice and free exercise of rights and how to strive towards equality shaped the Model Code (and by extension, the subsequent rules of conduct that have followed). While the concepts of the Model Code have remained relatively static in Model Rules of Professional Conduct today, understandings of inequality in a pluralistic society have developed further. This section seeks to bridge that divide.

Most likely, the drafters of the Model Code were familiar with arguments in favor of remedying social inequality through “colorblindness.” The concept of colorblindness was prevalent in discussions contemporary to the drafting of the Model Code as related to civil rights struggles of the 1950s and 1960s.¹⁸¹ The president of the ABA who called the Wright Committee, Justice Powell, went onto join the Supreme Court where he authored several important opinions regarding race and colorblindness.¹⁸² No doubt there is an appeal to the idea that the best way to make sure different people are treated fairly is to treat them all the same. The problem lies in determining how you will treat them all the same—and who defines that sameness.

The dangers of institutional mandates for neutrality are very similar to those imbedded in colorblindness in that both support, whether consciously or subconsciously, a hierarchy where the dominant groups’ status is the “norm” and all other groups are the non-neutral

180. I have borrowed this phrase from Eduardo Bonilla-Silva’s book of the same name. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (2010) (arguing that colorblindness creates its own form of racism). *But see generally* GEORGE M. FREDRICKSON, *WHITE SUPREMACY* (1981) (arguing that racism should only apply to practices that hinge on white supremacy, the idea that whites as a race are inherently better and more capable than other races).

181. *See* JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 28-34 (1996) (detailing the development of colorblindness arguments dating back to 1884 and up through the key discrimination legislation in the 1960s); *see also* Voting Rights Act of 1965, 52 U.S.C. §§ 10301–14 (2012); Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

182. *See* *McCleskey v. Kemp*, 481 U.S. 279, 327 (1987) (finding no discrimination in Georgia’s death penalty system despite the fact that Georgia imposed death sentences on blacks who murder whites at twenty-two times the rate of blacks who murder blacks); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (finding that racial and ethnic classifications of any sort are inherently suspect and call for strict scrutiny, even when remedial in nature).

“other.”¹⁸³ Norms and assumptions impact how rules are written and how institutions function.¹⁸⁴ This skews the system towards the preexisting status quo, regardless of intent, and creates a fissure between “our public commitments and our lived realities.”¹⁸⁵ Under this understanding, outsider groups are allowed entrance into traditionally exclusive groups, such as the bar, only if they conform their conduct to the dominant groups’ norms. Successful assimilators gain access to the dominant group’s power. The price is that in exchange, these people’s distinct views, skills, and cultural influences are cast aside.¹⁸⁶ Neutrality accommodates difference only by ignoring and therefore sublimating it. It does so by creating a neutral baseline comfortable to the dominant class of lawyers and based on their assumptions of what is neutral lawyer behavior. But assumptions are defined by this class’s experience and therefore are, necessarily, non-neutral.

Ian Haney-López lays out the limitations of colorblindness, noting that while it may have undercut ideas of white supremacy during the first phase of the civil rights movement, colorblindness was ineffective at dealing with systemic lingering racism.¹⁸⁷ So too here, one can imagine that perhaps at the outset of the Model Code, there may have been utility to shielding lawyers for the moral pronouncement of the majority. But whatever efficacy that policy may have had in relation to overt recognition, it has run its course.¹⁸⁸

183. In this way, neutral partisanship falls prey to similar pitfalls to John Rawls’s original position. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971) (asserting as his original position that the best way to create a just society was to organize it from behind a “veil of ignorance” as if one did not have any specific identity or moral standpoint and also had no idea where one would be placed within the social order). Presumably this situation would allow the party involved to be impartial and fair. However, critiques of Rawls have clarified how in the attempt to create an impartial self, Rawls has actually created an individual who cannot exist as a real person, because a real person is part of incorporated entities, like the family, that have their own imbedded structure. See OKIN, *supra* note 172, at 96-99.

184. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 157 (2006) (“Colorblindness is in this sense not a prescription but an ideology, a set of understandings that delimits how people comprehend, rationalize and act in the world.”).

185. *Id.* at 144.

186. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 103-05 (2000).

187. See LÓPEZ, *supra* note 184, at 157-58 (“In the wake of the civil rights movement’s limited but significant triumphs, the relationship between colorblindness and racial reform changed remarkably. Whereas colorblindness in the context of Jim Crow was heavy with emancipatory promise, in the civil rights era and since, its greatest potency instead lies in preserving the racial status quo.”).

188. See Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1, 6 (1991) (“[B]efore a private person or a government agent can decide ‘not to consider race,’ he must first recognize it. In other words, we could say that one ‘noticed race but did not consider it.’”).

The issue we face now is one of structural inequality.¹⁸⁹ Colorblindness still requires that whoever enters the dominant group assimilate or “pass” as white:

We must be careful not to discount the willingness of significant sectors within the White community to extend a presumption of full human worth to racial minorities—nor should we be surprised that this presumption of full humanity often translates into treating ostensibly non-White persons as if they were White.¹⁹⁰

Likewise, in the legal profession, compliance with neutral partisanship awards women and minorities full lawyer status for conforming their behavior to the preexisting norms established in lawyering prior to their entrance into the profession. As such, being treated “like a lawyer” translates into non-male, non-white, non-traditional lawyers being treated as the preexisting demographic of the bar (white men), or, alternatively, the way well-meaning white men might paternalistically treat women and minorities.

3. *The Model Code Decoded: Examples of Non-Neutral “Neutrality”*

Doctrinally, neutral partisanship is supported by attempting to set a baseline of conduct that is unpoliticized. However, the very conceptions of what is a lawyer’s proper role, what are a lawyer’s mandatory duties, and how daily practice unfolds have rippling repercussions for the bar generally, certain lawyers in particular, disenfranchised clients, and the legal system. These choices are not neutral, nor can they be. The choices made in the Model Code, and now the Model Rules, reflect a certain view of agency and the lawyer’s prioritization of duties to client, law, society, and broader morality. It is a moral view, and it cannot be neutral. In it, agency is defined in terms of a certain type of loyalty, a certain type of candor (regarding the law but not the lawyer’s self), a certain type of competency, and confidentiality. In it, duties to clients are paramount. The examples provided below are meant to be illustrative of this point, but not exhaustive.

The 1969 Model Code set priorities for the legal profession by enumerating skills or duties necessary for lawyering in the disciplinary rules. These enumerated duties included competence, diligence, loyalty, and candor.¹⁹¹ In keeping with established conventions of

189. See generally Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (discussing how intent and colorblindness combine to fail to remedy lasting structural inequality).

190. LÓPEZ, *supra* note 184, at 154.

191. MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101 (1980).

code interpretation, anything not on the list is excluded.¹⁹² Thus, the Model Code's explicit articulation of relevant skills also creates a list of irrelevant skills. Lawyers who have strengths that are not neutral under status quo-defined baseline are at a disadvantage.¹⁹³

For example, in attempting to reach a neutral baseline, the Model Code adopted a version of lawyering that minimized and marginalized skills associated with women, particularly skills emphasizing emotional intelligence or group consciousness.¹⁹⁴ Why? The Model Code was the first time the bar attempted to write rules that defined a baseline of conduct in a "neutral" way for a pluralistic group. The Canons, in contrast, did not need to be "neutral" across differences—the bar was generally homogenous. In the attempt to create a neutral code, the drafters of the Model Code most likely excised qualities that they felt were not neutral. However, since they defined a baseline from their viewpoints, a neutral code was one without "gendered" qualities—meaning those qualities associated with women.

Some of the qualities that could be included on this list are compassion, empathy/sympathy, and relationship building.¹⁹⁵ Compassion is not only excluded as a necessary lawyerly trait: one could argue it is expressly barred. For example, DR-103(B) forbids the ad-

192. In statutory interpretation terms this is known as "*expressio unius est exclusio alterius*," meaning "the express mention of one thing excludes all others." BLACK'S LAW DICTIONARY (9th ed. 2009).

193. The exclusion of these traits has actually led to a norm that is generally harmful to the profession, as the public has grown to perceive lawyers as heartless and self-interested, and lawyers themselves have fallen into higher rates of depression and dissatisfaction. See Jacquelyn Smith, *The Happiest and Unhappiest Jobs in America*, FORBES (Mar. 22, 2013, 2:55 PM), www.forbes.com/sites/jacquelynsmith/2013/03/22/the-happiest-and-unhappiest-jobs-in-america/ (listing associate attorney as the most unhappy profession in America).

194. For the sake of demonstration, we will use here the broad brush stroke definition of gendered qualities articulated by different voice feminism: men are associated with rules, enumerating duties, and individual ethics, while feminine qualities including sensitivity to others, loyalty, responsibility, self-sacrifice, and peacemaking all reflect interpersonal involvement. See *generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). While this breakdown is simplistic, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1980), it provides a broad jumping-off point that continues to be echoed in popular discourse to this day. See also LOUANN BRIZENDINE, THE FEMALE BRAIN (2006) (arguing that women's brains are configured to render them more adept to social and group interactions).

195. In relation to civility as well, the Canons make a stronger case than the Model Code. Specifically, the Canons discuss the need for a "respectful attitude" and expressly frown on using lawsuits to obtain funds from clients. See *Final Report*, *supra* note 18, at 579 (Canons 1, 14). Lawyers are chastised for engaging in "unseemly wrangling" as "[a]ll personalities between counsel should be scrupulously avoided." *Id.* at 580 (Canon 17). In questioning witnesses, the Canons caution against "improper speech" and "offensive personalities." *Id.* at 580 (Canon 18); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1980) (requiring only generally at (A)(1) that lawyers "avoid[] offensive tactics, [and] treat[] with courtesy and consideration all persons involved in the legal process").

vancement of funds to clients beyond specific circumstances relating to supporting the litigation.¹⁹⁶ At no point is a lawyer permitted to give funds to a client outright, regardless of need.¹⁹⁷ The Model Code and the current Model Rules fail to recognize a duty to provide emergency aid or need. In fact, the Model Code does not include an overall duty of a lawyer to communicate effectively with her client, although one rule requires that the client is notified of the receipt of assets,¹⁹⁸ and there are several rules that regulate communications with those with adverse interests as well as contact with witnesses, investigators, and the press.¹⁹⁹ Communication in general is a skill which women are often viewed as excelling in.²⁰⁰ While today a “duty to inform” a client is included in the Model Rules,²⁰¹ this initial omission is noteworthy.

Perhaps more telling than what was included in the Model Code from the Canons is what was removed or downplayed. Specifically, the Model Code deemphasized community building and relationships at the bar, emotional consciousness, and civility, qualities easily associated with traditional “feminine” qualities, despite the fact that these qualities are valued by clients.²⁰² The exclusion of certain skills that were previously present in the Canons is particularly insightful given the Code generally greatly expanded, rather than limited, the Canons.²⁰³ The preface of the Model Code notes a main goal behind drafting new codes was to add “important areas of conduct that were either only partially covered or totally omitted from the Canons” and observed that the Canons were “sound in substance” but needed editorial revision.²⁰⁴

As an initial matter, the Canons take a stronger view of the interconnected nature of the legal community and the duties of collegiality. The Canons expect lawyers to have loyalty to one another and an

196. See MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B), EC 5-8 (1980).

197. See *id.*

198. See *id.* at DR 9-102(B)(1) (“A lawyer shall: Promptly notify a client of the receipt of his funds, securities, or other properties.”).

199. See *id.* at DR 7-104, DR 7-107-10.

200. See HELEN FISHER, *THE FIRST SEX: THE NATURAL TALENTS OF WOMEN AND HOW THEY ARE CHANGING THE WORLD* 57-83 (1999).

201. MODEL RULES OF PROF'L CONDUCT R. 1.4 (requiring under the title “communication” in part B that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).

202. Ann Juergens, *Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients*, 39 WM. MITCHELL L. REV. 80, 113 (2012) (reporting results of a study of small firms and solo practitioners who served moderate-income clients, which found that the principal factors in lawyer success were relationship building, communication, and collaboration with non-lawyers).

203. The Canons were originally only nine pages long, while the Model Code was over fifty pages long when it was first passed.

204. MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980).

overall sense of civility. For example, Canon II (7) states that even if a client would like assistance of additional counsel, “[a] lawyer should decline association as colleague if it is objectionable to the original counsel.”²⁰⁵ The Canons also outline how “[e]fforts, direct or indirect, in any way to encroach upon the business of another lawyer are unworthy of those who should be brethren at the Bar.”²⁰⁶ However the Code makes no mention of such considerations nor of a duty of civility even in the broadest terms.

In compiling the necessary skills of lawyers, the Model Code also omits empathy and sympathy despite the fact that the Canons themselves outline specific instances mandating emotionally conscious actions. For example, the Canons admonish that an attorney should refrain from pushing trial forward where opposing counsel “is under affliction or bereavement.”²⁰⁷ The Canons also barred attempts to “curry favor” with jurors through “fawning, flattery, or pretend solicitude.”²⁰⁸ In the role of the advocate as articulated in the Model Code, there is no requirement to communicate or advise, taking into account the fear, anxiety, or general holistic state of one’s client. This has ongoing repercussions. The bar’s reticence to recognize as valid lawyer skills emotional intelligence and interpersonal aptitude has intensified over time as rules related to compassion have tightened²⁰⁹ and even time-honored lawyerly traits with emotional resonance, such as zeal, have fallen into disfavor.²¹⁰

Notably, the Model Code not only omitted certain qualities from the discussion of legal ethics—it also created new explicit duties. For the first time, a free standing duty of competence was articulated by designating a section of the Model Code under Canon 6 “A Lawyer Should Represent a Client Competently.”²¹¹ Competence is also referenced in the first Canon of the Model Code, which states that “[a] lawyer should assist in maintaining the integrity and competence of the legal profession.”²¹² In the enforceable and binding disciplinary rules, the Model Code commanded as follows:

205. *Final Report*, *supra* note 18, at 577 (Canon 7).

206. *Id.*

207. *Id.* at 581 (Canon 24).

208. *Id.* at 581.

209. This element of the Code continues to this day in Model Rule 1.8, which subjects lawyers to discipline even if they provide money to clients for necessary, emergency, or vital non-legal expenses. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002).

210. For a more thorough discussion of the removal of zeal as a requirement over time, see Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006); Lawrence J. Vilaro & Vincent E. Doyle III, *Where Did the Zeal Go?*, 38 LITIG. (No. 1) 1, 4 (2011).

211. MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1980).

212. *Id.* at Canon 1.

A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him.²¹³

Competence is defined in terms of substantive legal knowledge, preparation, and organization. It limited the ability of lawyers to take on cases in opposition to the existing bar, as practice in areas of law that were new to an attorney required an existing member of the bar to “associate[e]” with the work. Generally, competence was not assessed by clients, peers, or by senior attorneys in a mentorship style environment. Instead, the competence revolution manifested in the first multistate bar exams in 1972, the requirement of attendance at ABA accredited schools in most jurisdictions, compulsory bar membership with ongoing fees, and ongoing legal education requirements. Competence did not include emotional intelligence, negotiation skills, substantive knowledge of the community being served, communication skills, or demonstrations of substantive writing skills.

The Wright Committee made clear that competence was added to the Model Code as a measure for screening lawyers, arguing that “standards must be established to exclude people from admission to the bar who could not, or are not likely to, serve clients capably and well.”²¹⁴ The inclusion of a competence duty as defined and implemented erected a barrier to entry to the legal profession and a means to remove bar licensing. In particular, competence was highlighted as being of central importance to all parties, “only if all persons have access to the law, which requires that they have access to lawyers of integrity and competence,” will government be that “of laws, not of men.”²¹⁵ This distinction is particularly meaningful given the historic context of the Code’s drafting, when the issue of adherence to law had very real consequences in terms of support or lack of support for acts of civil disobedience. Committee Chairman Wright also articulated a more self-serving rationale: that misconduct by individuals would reflect badly on all lawyers and the judicial system.²¹⁶

213. *Id.* at DR 6-101(A)(1-3).

214. Wright, *supra* note 10, at 9.

215. *Id.* at 7.

216. *See id.* at 8 (“Lawyers are the face of our legal system that laymen most often see; the impressions that laymen have of our legal system are often in large measure by their impressions of lawyers.”).

4. *Day to Day Practice: Limited Lawyer's Roles, Limited Lawyers and Their Clients*

Divesting lawyers of broader social and moral responsibility beyond client service limits the lawyer's role in playing a unique and influential part in civil society. This limited role of lawyers may disproportionately impact socially disenfranchised individuals who become lawyers. The divestment of broader societal power from the attorney's role generally has a particularly acute impact for attorneys who do not have other means to access influence. These lawyers must use their education and professional status to impact causes they favor, as opposed to lawyers who are wealthy, well connected, or have other avenues for gaining influence. The limitation of the lawyer's role may also mean that some of the most educated and privileged members of a minority group (those who have law degrees) may be substantially limited in their ability to act politically through their work.

The neutral-partisan dominant ethos may discourage lawyers who are politically or morally motivated to become lawyers from joining the bar, since the neutral-partisan model of lawyering does not expect them to act upon their convictions. Likewise, it may also increase in the relative strength of the amoral lawyering contingent of the bar skews the legal profession away from even discretionary exercises of lawyer moral autonomy.²¹⁷ To a certain extent, the bar is self-selected: people who find the neutral-partisan ideal appealing are attracted to the practice of law. Likewise, the inverse is also true; those attracted to the practice of law to engage with broader issues of justice and morality are likely to be repelled. When these people consider or attend law school the "dominant view" sends the message that such views of a lawyer's role are fringe and bordering on unprofessional and that neutral-partisan client service is the central and perhaps only legitimate goal of lawyering.

The neutral-partisan limited role of lawyers also quiets the voices of lawyers who serve disenfranchised clients. The dominant ethos left

217. In the discretionary spirit of the work of Bill Simon, the current Model Rules do allow for certain discretionary exercises of morality but do not compel lawyers to act under these circumstances. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2013) (providing for disclosures pursuant to all exceptions to attorney duty of confidentiality, including those related to serious harms to third parties and those that are discretionary); *id.* at R. 1.16(b) (providing that lawyers may, under the right circumstances, withdraw from the representation where they have serious moral objections); *id.* at R. 2.1 (providing that lawyers may advise client on extra-legal concerns including "moral economic, social and political factors" relevant to a client's case); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). However, the discretionary exercise of lawyer morality does not eliminate imbedded issues regarding ambiguity and pervasive norms of practice as well as the toll that the neutral-partisan baseline takes on both lawyers and the public perception of lawyers.

in place under a standard conception regime is one that limits lawyer autonomy to a very narrow bandwidth—essentially rendering a lawyer's legitimate exercise of power in society as coterminous with that of clients. Therefore, lawyers who have powerful and sophisticated clients will also have broad power in society and leeway to pursue long-term legal goals and strategies. As repeat players, clients who are already sophisticated enough to comprehend and utilize the power of the law for societal influence can seek incremental structural change that is to their benefit. However, these clients do not need neutral partisanship to protect their autonomy; they are informed and have ample means to use market forces to curtail and shape lawyer behavior. On the other hand, lawyers with disenfranchised clients are comparatively limited. Clients from disenfranchised groups may not have the material means to set aside immediate relief in favor of developing long-term interests. Therefore, a system which does not set lawyer moral integration as a baseline leaves broad civic and moral issues almost exclusively to those who already have considerable social influence by virtue of their legal sophistication and wealth.

5. Discussion, Dissent, and Homogeneity: The Value of Pluralism

Somewhat ironically, amoral lawyering seeks to facilitate individual rights, equality, and diversity in American society by attempting to eradicate a plurality of views at the bar, leaving a neutral conduit for clients' pluralistic views/agendas. There is a certain democratization element here, if one believes, as was the case in the mid-sixties, that clients were the common people and lawyers represented the elite. However, the bar is larger and much more diversified today. In many lawyer-client relationships the client is more "elite" than the lawyer. In this context, a system in a democratic society that seeks to impose a false sense of homogeneity for the purpose of avoiding ideological conflict is fundamentally misguided. Ideological conflict and dialogue across difference is necessary and important to a functioning democracy. It is not to be avoided or quashed, particularly in a forum, such as law practice, with a strong pedagogical purpose and highly visible role in society.

Neutral partisanship buys at a heavy price the peaceable coexistence of lawyers and clients with whom they have a moral disconnect. To the extent that pluralism has value in American society, it must actually exist in the public space and be predicated on open difference, not concealment. Disagreement, discomfort, and discourse are necessary and beneficial to the growth of American democracy and to the development of just laws. Because of this, attempting to eradicate difference through "neutrality" may also be immoral. If the bar truly seeks to protect diversity and equality (moral goals according to the

modern apostles of neutral partisans), then legal ethical guidance cannot seek an ideal where lawyers behave as though they were a homogenous group when they are not, and should not be. Rather, peaceful coexistence despite difference is wrong if it is predicated on fabricating and imposing homogeneity.

Morally valid pluralism requires disagreement, not avoidance. Disagreement, as in “factions,” is useful and necessary in a democracy to allow all parties a fair hearing, impede rash and unjust action, and make incremental steps towards the development of morally worthy law.²¹⁸ This is as true in a civil action as in the voting process. The process of having civil discussions encourages competition of ideas and forces established thought to continually be reexamined, tested, and improved. Homogeneity allows ideas and power to stagnate and threatens the stability and legitimacy of a democracy.²¹⁹ However, difference must be open, apparent, and discussed for its value to be realized.

Lawyers act as civic teachers to their clients, explaining how the American system of justice is supposed to work, what civic obligations are, and how to engage in civil discourse across differences.²²⁰ Clients can educate lawyers about how law is actually working on the ground and present their own moral views. Clients and lawyers, specifically, and society at large, benefit from lawyers and clients engaging in discussions of morality and the law.²²¹ The current system abbreviates both the client’s moral input and the lawyer’s.²²² By requiring moral dialogue before selecting and seeking an outcome, the profession sends the reassuring message to clients and attorneys that morality does have a place in the consideration of law, supporting the legitimacy of legal institutions. Lawyers can feel pride in working towards a cause they believe in, and for an institution that values forthright conversation. The attorney client relationship would flour-

218. THE FEDERALIST No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999) (stating that factions are a necessary means of protecting minority interests: “Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”).

219. Arguments in favor of the valor of difference play out more often in the literature related to market economies, where homogeneity is seen as stifling agency, innovation, and creativity.

220. See generally Bruce A. Green & Russell G. Pearce, “Public Service Must Begin at Home”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1235-37 (2009) (arguing that, at a minimum, lawyers have a duty to discuss ideals of civic duty and virtue with clients).

221. See LUBAN, *supra* note 128, at 38 (arguing that the discovery of moral differences need not end the attorney-client relationship and proposing a different ideal of a “law practice in which the lawyer who disagrees with the morality or justice of a client’s ends does not simply terminate the relationship, but tries to influence the client for the better”).

222. See Pepper, *supra* note 11, at 630.

ish as lawyers have conversations with their clients that are not steeped in knowledge inequalities; both client and lawyer have equal claim to moral expertise (which may well be none).

Because lawyers are in a unique position to understand the complexity of the law, it is vitally important for our society to have lawyers interact and examine the law applying their ordinary moral compass.²²³ The only time this becomes a problem is if we assume, as Stephen Pepper does, that lawyers share a monolithic and elitist sense of values. Thus, the problem in this model of lawyering is not the application of ordinary values to legal representation or laws, but the application of a limited subgroup's ordinary values to these enterprises. In this way, moral legitimacy is intimately intertwined with diversifying the legal profession. However, for the reasons discussed earlier, the system as it stands fails to encourage the inclusion of divergent moral dialogue.

A general culture of dissent and discussion among the bar and their clients enfranchises citizenry. It combats unnecessary lawyer paternalism and legitimates government institutions. The sense that different voices will be heard encourages a culture of debate, participation, and investment in the project of governance. Compelling role integration, rather than differentiation for lawyers, adds actual transparency to the social structure of society, the attorney-client relationship, and the legal profession as a whole.

V. CONCLUSION

This Article took on three key questions to understanding modern legal ethics and the current law regulating lawyers: (1) When did lawyers stop discussing professional conduct in the workplace in moral terms? (2) Why was that choice made? (3) What are the failings and current impacts of that choice? As to the first point, this Article argues that the advent of the 1969 Model Code marked a break in the marriage between the ideas of professional conduct and role integration. In explaining this shift, the Article draws on historical sources and textual analysis to make the argument that the choice to limit moral agency was one grounded in a pragmatic need to facilitate a certain view of pluralism. Finally, the remainder of the Article outlines how the advantages of neutral partisanship in terms of pluralism (as defined by its advocates) fail in many respects.

The Model Code and subsequent professional norms are vestiges of a charged historical moment, a moment in which the language of

223. Particularly now when law is increasingly voluminous and specialized, lawyers may be the only parties who know of the complex apparatus of law in a given area and its ramifications.

difference was nascent and theoretical understanding of diversity, equality, and individual rights was underdeveloped. In that context, even well intentioned parties could perceive a commitment to divorcing ethics from professional conduct and justifying neutral partisanship as moral, based on a flawed conception of how to facilitate equality and plurality.

Yet lawyers, as a profession, continue to plow forward without taking into account that historic moment, the tensions inherent in that moment, and the missteps taken in accordance with those early misconceptions of facilitating change, equality, and pluralism at the bar. In creating a code that incorporates latent bias, delegitimizes the discussion of broad ethical themes, and undermines lawyer individualism by adopting a homogenizing neutral-partisan ideal, the Model Code fundamentally undermined meaningful long-term pluralism, legal ethics, and the profession as a whole.

Today, the legal profession and modern legal ethics continue to struggle with the historic legacies built deep into the doctrinal and normative framework of the Model Code. Setting aside moral discourse among lawyers in service of demographic pluralism and adopting neutral partisanship was a poor trade, grounded in fundamental theoretical misconceptions of what neutrality and pluralism require. Adopting neutral partisanship as the “standard conception” of lawyering prevented, rather than enabled, the meaningful inclusion of the values of new entrants to the bar and solidified an ideal of lawyers that is dehumanizing. Neutral partisanship limits all lawyers’ ability to legitimately articulate their moral judgment, differing viewpoints, and unique experiences in the workplace.

The story here is not one of calculated malevolence. The architects of the Model Code were reasonable people drafting what appeared at the time to be a sensible plan to respond to a changing professional landscape. But these drafters were limited by the scope of their personal experiences and historical context. Their limitations need not be ours.